(1) Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SENTINEL TRUST CO., AND DANNY N. BATES, CLIFTON T. BATES, AND GARY L. O'BRIEN,
Petitioners

v.

KEVIN P. LAVENDER, COMMISIONER OF THE TENNESSEE DEPARTMENT OF FINANCIAL INSTITUTIONS, Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS FOR THE MIDDLE SECTION OF TENNESSEE, IN NASHVILLE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question No. 1: Pursuant to a valid and deliberate law conditionally authorizing seizure of a *state bank*, did Tennessee—by acts of its Commissioner of Financial Institutions—violate the Due Process Clause of the Fourteenth Amendment by seizing instead a *state trust company* without a prior hearing under a statute conforming to Federal Due Process hearing requirements,[1] but which authorized emergency seizure of a *state bank* without prior hearing only upon narrow grounds that were not met herein and that *could never be met* by a state trust company prohibited from exercising banking powers?

Question No. 2: Did Tennessee's taking of Petitioner trust company's valuable property and business herein violate the Due Process Clause of the Fourteenth Amendment in its narrowest meaning[2] as lacking due process *of that state's law*—not conflicting with this Court's present expanded Due Process jurisprudence—by its deliberate disregard of *all existing Tennessee law* that would have prevented or remedied the taking, including, *inter alia*, by *(i)* its pretense that statutory empowerment to seize a *state bank* authorized seizure of a *state*

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[1] In accord with *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982),

[2] Expounded and applied by *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908).

trust company; (ii) its arbitrary refusal to apply its law of statutory construction to decide if state bank seizure statute impliedly authorized state trust company seizure; or *(iii)* even if so authorized, by its refusal to recognize that the clearly-stated statutory pre-condition to state bank seizure without prior hearing was not met; and because *(iv)* its appellate judicial review (a) was denied when such review could have interrupted liquidation without harm to any state or private interests and (b) when finally exercised upon appeal of right, the Court —by restricting the basis of its review to the administrative investigative record, without recognizing that the appeal was from a judgment based on an evidentiary trial record before it—then refused to perform the required broader bench-trial review, without any stated legal basis or explanation, thereby pretermitting decision of all of the briefed state law issues that would have required reversal, not addressed by the Court?

Question No. 3: Is decision of the foregoing Due Process Clause violation issues affected by the additional factors that *(i)* Only this Court has jurisdiction to review a state's appellate decisions; *(ii)* After Tennessee courts had demonstrated that they *would not* apply the state's law of statutory construction and before the evidentiary trial, a U. S. District Court refused to take jurisdiction of an injunctive action solely upon comity grounds, because "The higher appellate courts of Tennessee, and ultimately the United States Supreme Court, will be the final arbiters of the construction **and** interpretation of the Tennessee banking statutes at issue in this case."[3] and *(iii)* the law recognizes that facially-dispositive appellate issues, whose adjudication was declined when presented, remain without *res judicata* determination so as to be subject to later adjudication

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[3] *Sentinel Trust Co., et al., v. Lavender,* 2004 U.S. Dist. LEXIS 27259 at *29 (M. D. Tenn., 2004; emphasis added).

by a United States District Court in any action within its jurisdiction?

PARTIES

Petitioner Sentinel is wholly-owned by Petitioner Danny N. Bates and his wife, so no Rule 29.6 disclosure is required; the other individual petitioners are Directors of Sentinel and the names of all other parties appear in the caption.

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CITATIONS TO REPORTS

The report of the decision of the Tennessee Court of Appeal is *Sentinel Trust Co., et al., v. Lavender,* 2005 Tenn. App. LEXIS 841 (Tenn.App., M.S., 2005), the order of the Supreme Court of Tennessee denying the timely Application for Permission to Appeal is not reported, and the trial court orders are not reported.

BASIS OF THIS COURT'S JURISDICTION

(i) The order of the Supreme Court of Tennessee was entered July 3, 2006, denying application for permission to appeal, which order imparted finality to the Opinion and Decision of the Tennessee Court of Appeals rendered December 29, 2005.

(ii) The statutory provision believed to confer on this Court jurisdiction to review the judgment and orders in question is 28 U.S.C. § 1257

CONSTITUTIONAL AND STATUTORY PROVISIONS

Such provisions are Constitution of the United States, Fourteenth Amendment, Section 1, 28 U.S.C. § 1257, and, as to Questions Nos. 2 and 3, limited excerpts from the Tennessee Banking Act, with relevant parts high-lighted, all printed in Appendix F.

STATEMENT OF THE CASE

The case originated with a timely petition filed in the Chancery Court of Davidson County, Tennessee, for writs of *certiorari* and then *supersedeas,* to review administrative actions of the Tennessee Commissioner of Financial Institutions in seizing the properties and business of Sentinel Trust Company situated in Lewis County, Tennessee.[4] All U. S. constitutional questions were raised at every stage of all proceedings, with excerpts printed in Appendix G. Such objections were made in the Petition for *Certiorari (Infra,* pp. G-142-145), the *Certiorari* trial brief *(Infra,* pp. G-145-147), Petitioners' Brief in the Court of Appeals *(Infra,* pp. G-148-149), and the Application for Permission to Appeal in the Supreme Court of Tennessee *(Infra,* pp. G-150-151).

Petitioners also sought to protect such rights by a separate Federal injunctive action under 42 U.S.C. § 1983

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[4] The bank-seizure statute requires that after the Commissioner seizes a bank upon his administrative determinations, he must to seek approval of certain listed decisions by the local chancery court, without the commencement of any litigation therein. As a consequence, several final judgments approving such administrative decisions were also appealed to the Court of Appeals, and these appeals were consolidated for argument with the instant case after separate briefings, and were determined by a single opinion.

against the Commissioner in his official capacity only.[5] The Court dismissed the action without prejudice because of comity respect of state jurisdiction, stating, "The higher appellate courts of Tennessee, and ultimately the United States Supreme Court, will be the final arbiters of the construction and interpretation of the Tennessee banking statutes at issue in this case." *Sentinel Trust Co., et al., v. Lavender,* 2004 U.S. Dist. LEXIS 27259 at *29.

In May, 2004, the Commissioner of Financial Institutions (hereinafter, the Commissioner or the State) seized Sentinel Trust Company, not a bank, claiming authorization by a provision of the Banking Act (Tennessee Code, Title 45, Chapters 1 and 2) that empowered him to seize a "state bank" upon his determination that the statutory grounds for seizure were met.

At all times, it has been recognized by the State that there was no pre-seizure hearing. There was no statute whose literal terms authorized seizure of a state trust company, and when bank-seizure grounds existed, the statute, T.C.A. § 45-2-1502 and 45-2-1504 authorized seizure without a prior hearing **only** upon a determination that the state bank's condition "will result in serious losses to depositors, . . ." T.C.A. § 45-2-1502(c)(1). Bank depositors are unsecured creditors in

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[5] This was filed upon the theory that actions of all state courts in refusing to apply the Tennessee law of statutory construction and application without statement of any statutory construction rationale met the conditions required for invoking Federal jurisdiction, where acceptance of Petitioners' arguments on construction would have nullified state action and rendered it unnecessary to consider any constitutional objections.

Tennessee as everywhere, and upon bank insolvency, Tennessee accords them no priority in payment from the bank's assets except to the extent of $100.00 per account. The state trust company is forbidden to engage in the banking business, which requires the acceptance of deposits that create the debtor-creditor relation, and therefore has no depositors.

Sentinel was indenture trustee on over 100 bond issues, in the course of which it received over $100 million a year from bond issuers on the required payment dates fixed by bond indentures and disbursed the same amount every year to bondholders on different dates fixed by the bonds.

The Department–Sentinel conflict arose some years after Sentinel became obligated to liquidate the bond-collateral assets of 63 health-care related companies, which became insolvent because Federal changes in reimbursement entitlement rendered their income insufficient to support their bond-payment obligations. As to each defaulted bond issue, Sentinel was authorized to liquidate at that issue's expense, and has first priority for payment of liquidation expenses from that issuer's assets.

All the bond-related funds were kept in a pooled bank account having a daily balance in the millions of dollars, with Sentinel's books showing all transactions in every account and their balances at all times. The liquidation labors had continued from around 1999 through seizure in May, 2004, in the course of which Sentinel liquidated the assets of 50 defaulted bond issues at no expense to itself or to the pooled funds because each issuer's assets were adequate.

To finance the liquidation during these years, Sentinel, with the State's knowledge and approval (as shown by the State's administrative record), charged all liquidation expenses against that issue's account, causing overdrafts that in effect

were equivalent to informal borrowings secured by the issue's pledged assets. These liquidations returned profits to the pooled funds without expense to the solvent bond-issuers, because their correct balances each month were credited with the average daily earning rates on the entire fund's Account. Profits for the pooled funds were realized because Sentinel's charges included 1½% per month, compounded monthly. This mode of financing liquidations on bond-issuer assets is followed by trust companies and bank trust departments throughout the country.

After the 2004 installation of a new Commissioner, he took exception to this method of financing through overdrafts as *de facto* loans, and insisted that Sentinel proceed in rapid stages to inject capital equal to the total negative of all remaining bond-issuers' accounts, *and then go out of business.* The negative balance was then over $7 million, more than half of which was in compounded interest to be received as profits by the pooled account as each issuer's liquidations were completed. Sentinel could not and did not make this contribution demanded by the Commissioner, and the Commissioner thereupon seized it, all its bank accounts, and its real and personal properties.

In the eventual evidentiary trial, the State conceded that financing liquidation through overdrafts had not caused any loss to any bond-holder[6] (trust beneficiary),[7] it conceded that

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[6] THE COURT: I grant you all that. But as was pointed out, they had never as yet failed to pay a bondholder, right?

MS. KLEINFELTER: Right. But the problem there was it was because they were continuing -- when they had money come in June that may be for bond payments not due until December, they were using them to make the June

but for the seizure, Sentinel could have completed liquidation of all assets in the remaining 13 issues without any loss to bondholders—but that it could have done this only by continuing the customary allowance of overdrafts pending liquidation.[8]

At no time did the State find or allege that there was any threat of loss to "depositors" nor did it identify any statute forbidding this mode of temporary financing when the debt is covered by adequate collateral.

The development of Tennessee's "trust company" regulation was that the Commissioner had no authority over trust companies until a 1980 legislative amendment required that all future trust companies be pre-approved by the Commissioner to be chartered, and subjected those companies to limited regulation, with Sentinel being a "grandfathered" trust company immune from such regulation. Then in 1999, the Legislature amended the Banking Act, Chapters 1 and 2 of Title 45, to bring all other trust companies under the Department's regulatory authority. It did this by a provision that henceforth, such companies shall be "subject to Chapters 1 and 2 of this Title." T.C.A. § 45-1-124.

The Act authorized the Commissioner to seize a "state

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bond payments. (Trial transcript, Vol. XIV, pp. 516-517)

[7] Relevant, because Tennessee law shields every corporate fiduciary from any monetary damages for any breach of trust except to the extent that this causes loss to a trust beneficiary or delay in receipt of a payment required by the indenture, T.C.A. § 35-3-117(j).

[8] *Supra*, n. 6.

bank," T.C.A. § 45-2-1502, but it contains entirely different provisions for liquidating the assets of a "state trust company," T.C.A. § 45-2-1021, which provisions do not include seizure; it provides that the Commissioner's "seizure powers" could be exercised over one other type of company, not including "Trust Company" within this provision, T.C.A. § 45-1-103(3); it declares that the word "bank" *includes* "trust company" as used in six code sections on fiduciary powers, T.C.A. §§ 45-2-1001 and 45-2-1002–1006; and it states that the Commissioner is authorized to use his "examination powers" over trust companies newly brought under the Act for the period from July 1, 1999 through June 30, 2002, T.C.A. § 45-1-124(h).

The Attorney-General has insisted that the subjection of all trust companies to the provisions of "Chapters 1 and 2," being the Banking Act, *ipso facto* expanded the State's bank-seizure powers to cover trust companies as well. The Courts in this case accepted that insistence, although Tennessee law recognizes it is not an application of the law of statutory construction to "construe" the statute on the basis of an isolated provision, *Cummings v. Sharp*, 173 Tenn. 637, 643-644, 122 S.W.2d 423, 425, as quoted and followed in *Rose v. Blewett*, 202 Tenn. 153, 163; 303 S.W.2d 709, 713 (1957).[9] On this basis, Petitioners have insisted that the courts have refused to apply the law of statutory construction in approving the State's actions claimed to be a part of its bank-seizure powers.

This is the course followed by Tennessee courts in disposing of this litigation: The trial court—hearing arguments of law on the application for *supersedeas* to nullify the seizure

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[9] These cases have followed since their decision, and neither has been subject to any critical comments in any judicial decision.

actions as not authorized by law, determinable by applying the law of statutory construction— denied the writ by opinion that did not purport to apply, nor even mention, the law of statutory construction *(infra,* App B).

On the subsequent evidentiary trial of the *certiorari* issues, the Court refused to consider any statutory construction argument because it had previously been rejected (without expounding any statutory-construction rationale),[10] despite a reminder that Due Process required the impartiality by retaining an open mind upon a trial on the merits (*Infra,* pp.G-163-165). In colloquy, the Court recognized that *if* financing by permitting overdrafts were illegal (as assumed) , the law did not empower the Commissioner to seize for any illegality except for impending "serious loss to depositors."[11]

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[10] "THE COURT: I understand your argument about the statute. *That's been resolved, at least by this judge, against you.* I'm more interested in the facts here. I want to be very explicit here.

"The statute, 45-2-1502, says, 'If in the opinion of the commissioner an emergency exists which will result in serious losses to the depositor, the commissioner may take possession of the state bank without prior hearing. . . .

"Now, that's what the provision of the statute -- I mean, that's the issue before me, whether an emergency existed which will result in serious losses of the depositors." (Trial Transcript, Vol. XIV, p. 489; emphasis added).

[11] "MS. KLEINFELTER: Well, if it hadn't been for the seizures -- well, the problem is, Your Honor, without the seizure, Sentinel would not have stopped the practice, their illegal practice. They would have continued to use the funds.

In the evidentiary trial with no negative credibility determinations, Petitioners proved that Sentinel's operations were legitimate, accorded with universal trust company practices, had caused no losses to any trust beneficiaries, and that at the time of its seizure, Sentinel owed no debts against its multi-million dollars in assets.

By testimony of the President of the Tennessee Association of CPA's, as Sentinel's expert witness on the trial, it was proven that there was no basis for the Commissioner to determine that Sentinel was insolvent; that its method of financing imposed no hazard considering the size of the cash flow; that depending upon time lapsed until liquidation, interest charges on overdrafts would double, triple or even quadruple the return to the pooled funds; that such profit would belong to the bond issuers with money in the fund, not to Sentinel; and that it would be impossible to determine whether Sentinel would end up solvent or insolvent until the completion of all liquidations.

The Court did not discredit any of Sentinel's witnesses and the State did not call *any* witnesses, but relied on the administrative record, which was only an investigative record

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"THE COURT: *But you can't seize to stop an illegal practice.* I mean, the commissioner has the authority to issue cease and desist orders. . . .

"THE COURT: That is not like a run on a bank where you are going to have two-thirds of *the depositors holding nothing, is it?* It may destroy Sentinel, but how would *the bondholders,* given if the trust -- the future relationship is transferred to another company, how does that harm the bondholders?"
(Trial Transcript, Vol. XIV, pp. 525, 528; emphasis added).

of the series of examinations, without any verbatim transcript, but including file memos of state-employee recollections of statements and events, e-mails and internal reports.

On appeal, Petitioners presented extensive argument on constitutional issues, statutory construction, the legality of using overdrafts in pooled trust-fund accounts to finance liquidation, and the lack of authority to seize. The Attorney-General's brief did not respond to these arguments, but presented its own argument that the Commissioner's actions were supported by the investigative record, as is done in review of administrative action on an evidentiary-hearing transcript, although the only administrative "record" before the Courts, as indicated above, was an investigative record of a series of examinations. The Court of Appeals accepted the State's position by treating the case as if were a review of such an administrative hearing determination, proven by a hearing transcript. The opinion gave no indication that there had even been an evidentiary hearing in the trial court as the basis of that Court's decision it was reviewing.

The opinion of the Court of Appeals failed to present statutory construction rationale on interrelated provisions of the Banking Act, not even mentioning "statutory construction" in its opinion. It disregarded Petitioners' showing that Tennessee had neither statutes nor regulations on a trust company temporarily using overdrafts to fund liquidations of properties adequate to cover expenditures, and that the only recognized standard was that of the Federal Government in the F.D.I.C.'s *Trust Manual and Manual of Examination Policies,* which recognizes the propriety of using pooled trust funds and permitting overdrafts for trust purposes. Hence, the Court of Appeals pretermitted consideration of all these issues presented by the Appellants therein.

With no trial court negative credibility determinations, such course of trial and appellate review leaves the case laden with unadjudicated issues with no state judicial remedy available. Apparent finality is imparted to the decision, with no court having applied the law of statutory construction to construe the statute. State law recognizes that if a court declines to resolve some issues that would require reversal, such unresolved issues are not *res judicata* upon the parties, *Shelley v. Gipson,* 400 S.W.2d 709 (Tenn., 1966);[12] 1 TENN.JUR., *Res Judicata,* § 30.[13] The opinion herein gave no justification for

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[12] Stating, in part, "In *Cantrell v. Burnett, & Henderson Co.,* 187 Tenn. 552, 556-557, 216 S.W.2d 307 (1948), the Court held that the former judgment also *estops the parties* and their privies in any other cause of action *to relitigate any matter which was actually determined* in the prior suit." (400 S.W.2d, at 712; emphasis added).

[13] Stating, "No judgment is res judicata as to matters which have not been adjudicated." This is supported by footnoted citations, including *"Groveland Banking Co. v. City Nat'l Bank,* 144 Tenn. 520, 234 S.W. 643 (1921). It is denied that any case, either from the courts of the United States or elsewhere, governed by the general principles of the common-law jurisdiction, goes to the extent of holding that a judgment of a competent court having jurisdiction of the parties and subject matter is res judicata as to matters and *issues which it did not decide, but which, from the face of its record, it refused to decide* and exclude from its decision, although under the pleadings it might have decided, and had the right to decide. . . . [U.S. citations omitted] To sustain a plea of res judicata, it must appear that the issue was not only involved in a former suit, but that the issue was *litigated and*

its failure to apply the normal rule that upon appeal of a certiorari trial court' decision on an evidentiary bench trial to review administrative action, the appellate hearing is *de novo*, respecting credibility determinations, *Realty Shop v. Westminister Holding, Inc.*, 7 S.W.3d 581, at 596 (Tenn.App., M.S., 1999, App.den.1999), and that if the administrative agency or State rests its case upon the administrative record after the complaining citizen has submitted adequate testimonial evidence, such testimony is given effect as having been without refutation. *Wells v. Tennessee Board of Regeants*, 9 S.W.3d 779, at 785 (Tenn., 1999).

REASONS FOR GRANTING THE WRIT

This petition presents a glaring need for reaffirmation of the truth that the Fourteenth Amendment's Due Process Clause, as originally expounded by this Court, *still* prohibits each state from destroying a citizen's life, liberty, or property except by due process of *that state's law.*

A combination of factors render this case highly appropriate for resolving this common problem: This Court is the sole repository of the power to review final state appellate action. But this Court simply cannot sit as a court for the correction of errors. Yet if a state's appellate judiciary condones or participates in state forfeiture of life, liberty, or property not authorized by the law of the land, the consequence is a destruction of these constitutional rights without any apparent remedy, as well as the resulting concealment of the

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decided. Hull v. Vaughn, 23 Tenn. App. 448, 134 S.W.2d 206 (1939). (Emphases added).

event by the state's judiciary .[14]

Such result is not contemplated by the Fourteenth Amendment nor by Acts of Congress designed to enforce it. This travesty occurs *(i)* by the appellate technique of giving no indication that issues were properly presented that would require a result different from that which was desired by the state appellate court, or *(ii)* by mis-stating dispositive facts and thereby adjudicating a fictitious case rather than the one before the Court. It should be reaffirmed that there has been no final *res judicata* determination of issues the court pretermitted at the appellate level.

Determinations by a U. S. District Court of the issues that should be given rational solution would not actually be an appellate review of state decisions. It would simply be a determination of issues never adjudged by the state appellate courts, despite appearances, although such state Court had the opportunity and duty to adjudicate them.

These dispositive but pretermitted issues must be determined, or else the Due Process Clause fails to control the actual dispensation of justice. Recognition that the issues remain subject to adjudication would be similar to permitting a collateral action against a judgment that is void for lack of subject-matter jurisdiction.

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[14] This is particularly true in Tennessee, because records of every appealed case, including briefs and opinion, always have been preserved in the State's or Court's archives, but since around the turn of the century, a new policy requires that all such appellate records except the opinion be destroyed shortly after finality unless claimed by one of the parties.

There is great need for a clear decision through an enunciation by this Court that the core meaning of the Fourteenth Amendment's Due Process Clause remains effective, and that under that part of this nation's "supreme Law of the Land," no state court is free to omit performing its obligation to assure that *the law of the land of that state must be followed* whenever the State deprives any citizen of life, liberty, or property. Or else, there should be a clear explanation of how and why this basic protection has vanished.

The damage addressed by First Question *could* be resolved by a simple grant of the Writ and order vacating the appellate decision below and mandating that the Court of Appeals decide all controlling issues in full accordance with early Due Process decisions herein cited.[15]

Under the Second Question, a decision that state appellate courts are not constitutionally free to slough off valid constitutional objections without taking notice and making deliberate determination of controlling issues should impel greater state loyalty to this judicial obligation. In future cases, this would leave this Court free to vacate and remand by simple citation of past holdings, instead of laboriously undertaking to determine state-law questions.

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[15] It being a historical fact that the Fourteenth Amendment and the early statutes enforcing it were largely impelled by a distrust of states' willingness or ability to honor the new obligations so created, even today, in litigation between a citizen and an executive at the highest level of state government, total impartiality by state judges would appear difficult to achieve.

In the instant case, there appears no impediment to this Court rendering an appellate decision on the merits because of the lack of confusion on the content of state law and the State's studied refusal to attempt to answer Petitioners' contentions at any level of Tennessee's judicial system.

The appellate disregard of governing law, as indicated above, *(supra,* pp. 11-12) is a clear and present evil. It cries out for a remedy.

Respectfully submitted,

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APPENDIX A
OPINION OF THE TENNESSEE COURT OF APPEALS

IN RE: SENTINEL TRUST COMPANY. SENTINEL TRUST COMPANY, et al v. KEVIN P. LAVENDER

Nos.: M2005-00031-COA-R3-CV, M2005-01773-COA-R3-CV, No. M2005-01073-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

2005 Tenn. App. LEXIS 841

November 17, 2005, Session
December 29, 2005, Filed

PRIOR HISTORY: [*1] Tenn. R. App. P. 3; Appeal as of Right; Judgments of the Trial Courts Affirmed. A Direct Appeal from the Chancery Court for Lewis County. No. 4781. The Honorable R. E. Lee Davies, Chancellor. A Direct Appeal from the Chancery Court for Davidson County. No. 04-1934-I. The Honorable Walter C. Kurtz, Judge.

DISPOSITION: Judgments of the Trial Courts Affirmed.

COUNSEL: Carroll D. Kilgore of Nashville, Tennessee for Appellants, Sentinel Trust Company, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General, Janet M. Kleinfelter, Senior Counsel for Appellee, Commissioner Kevin P. Lavender, Tennessee Department of Financial Institutions.

J. Graham Matherne of Nashville, Tennessee for Appellees, Commissioner Kevin P. Lavender and Receivership Management, Inc., Receiver for Sentinel Trust Company.

JUDGES: W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

OPINIONBY: W. FRANK CRAWFORD

OPINION: This appeal involves three cases consolidated for oral argument. Because of the duplication of the major issues in the cases, we consolidate [*2] the cases into one opinion. The Commissioner of the Tennessee Department of Financial Institutions, acting on statutory authority, took emergency possession of a Tennessee trust company, filing due notice of such action in the Chancery Court of Lewis County. Subsequently, the Commissioner gave notice, as required by statute, of the liquidation of the company, which was commenced in the Chancery Court of Lewis County. The company filed a petition for writ of certiorari and supersede as in the Chancery Court of Davidson County. The court denied the petition for supersede as and dismissed the writ of certiorari. Appellants appeal. We affirm. In the Lewis County Chancery Court proceeding, the court approved the transfer by the Commissioner of the various fiduciary accounts

administered by the company and other assets of the company, and the appellants appeal. We affirm. Included in the disposition of the property was real estate located in Bellevue, and the Commissioner filed a motion in the Lewis County Chancery Court for approval of the sale of this real estate. Objections were filed to the Bellevue sale motion. The court, after hearing proof, approved the sale. Appellants filed separate [*3] appeals. We affirm.

OPINION

Sentinel Trust Company is a state-chartered trust company located in Hohenwald, Lewis County, Tennessee. Danny N. Bates, Clifton T. Bates, Howard H. Cochran and Gary L. O'Brien ("Appellants") are all either former directors, officers and/or shareholders of Sentinel. Appellee, Kevin P. Lavender ("Commissioner") is the Commissioner of the Tennessee Department of Financial Institutions.

In April of 1999, the Tennessee General Assembly enacted Public Chapter 112, with an effective date of July 1, 1999. The enactment of Public Chapter 112 revised T.C.A. § 45-1-124 n1 such that "the provisions of chapters 1 and 2 of [the Tennessee Banking Act], and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers." Under T.C.A. § 45-1-104, the Commissioner is charged with enforcing and administering the provisions of chapters 1 and 2 of Title 45 of the Tennessee Code Annotated. n2 On June 16, 1999, the Department of Financial Institutions ("Department") sent a letter to all Tennessee trust [*4] companies not previously under the Department's regulation, including Sentinel, informing the trust companies that, with the

enactment of Public Chapter 112, they were now subject to the jurisdiction of the Department.

n1 Public Act 112 made the following changes to T.C.A. § 45-1-124. T.C.A. § 45-1-124(d) was amended by adding the language and punctuation "trust companies," after the words "state banks," and before the words "savings and loan associations," and by deleting subsection (b) in its entirety and substituting the following as a new subsection (b). Changes are indicated below in bold:

> **(b) To the full extent consistent with such rights, liabilities, and penalties, all state banks and, to the extent applicable, all banks, shall hereafter be operated in accordance with the provisions of this chapter and chapter 2 of this title. Unless the commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers.**
>
> (d) Except to the extent inconsistent with or contrary to specific provisions of chapters 1, 2 and 3 of this title, Tennessee state banks, **trust companies,** savings and loan

> associations, and savings banks, and their directors, officers and shareholders shall be governed by and subject to the Tennessee Business Corporation Act, compiled in title 48, chapters 11-27, as the same may be amended from time to time, and successor statutes thereto. The commissioner has the authority to interpret the Tennessee Business Corporation Act as it applies to financial institutions subject to regulation by the commissioner.

[*5]

n2 Chapter 1, Part 1, of Title 45, Department of Financial Institutions, reads:

> The department, created by § 4-3-101, is charged with the execution of all laws relative to persons doing or engaged in a banking or other business as provided in this title, except for pawnbrokers covered by chapter 6 of this title or persons licensed under the Tennessee Title Pledge Act of 1995, chapter 15 of this title.

On December 31, 1999, the Department commenced a formal examination of Sentinel pursuant to T.C.A. § § 45-1-

124(h) n3 and 45-2-1602(a)(1). n4 The Department made the following findings: Sentinel had no written policies for any aspect of their Trust Administration Department. Sentinel's President and sole shareholder, Danny Bates, had virtually unrestricted access to all areas of the company with few compensating controls. Furthermore, the Department found that Mr. Bates was responsible for all of Sentinel activities including managing and monitoring existing accounts, compilation of the general ledger, asset management and account reconciliation. Additionally, [*6] the report stated that collateral enforcement costs were being paid by allowing overdrafts within the pooled fund against each defaulted bond-issuer, which consisted of fees and expenses associated with defaulted bonds that had not been collected. The Department's examination report noted these deficiencies and violations and gave Sentinel a composite rating of "3". n5 However, the report also included the analysis that "Management works aggressively" and that Sentinel had a "high rate of success in resolving defaulted bonds in favor of bondholders." The Department's report noted that Sentinel was a grandfathered trust company and had until three years after the July 1, 1999 enactment of Public Chapter 112 to come into compliance with the noted deficiencies and violations.

n3 T.C.A. § 45-1-124(h) reads as follows:

> (h) All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and prudent to conform to the

requirements of chapters 1 and 2 of this title and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999. During this period of time, to conform to the requirements of chapters 1 and 2 of this title, the commissioner may conduct examinations at such company's expense, and apply the requirements of chapters 1 and 2 of this title as deemed appropriate.

[*7]

n4 T.C.A. § 45-2-1602 reads as follows:

(a)(1) The commissioner shall, either personally or by competent examiner appointed by the commissioner, visit and examine every bank subject to the commissioner's supervision at least once in each year. The commissioner has discretion to determine the scope of the examination; provided, that a full-scope examination, as set out in subsection (b), shall be conducted by the commissioner or the commissioner's designee at least once in every three (3) years. The commissioner has discretion to accept, in any calendar year, all or part of an examination report of a federal banking

regulatory agency conducted of a state bank in that year.

n5 All trust companies and bank trust departments in Tennessee are evaluated under the standards provided by the Uniform Interagency Trust Rating System. Under this system, a trust company or department is evaluated in five component areas: management; operations; internal controls and audits; earnings; compliance and asset management. The trust company is rated "1" to "5" (with "1" being the best and "5" being the worst) in each component area and then given a composite rating between "1" and "5."

[*8]

In November of 2000, the Department was made aware of a judgment from Davidson County Chancery Court against Sentinel in the case of ***National Commerce Financial Bancorporation v. Sentinel Trust Company,*** No. 97-2243-I. The lawsuit alleged that Sentinel had breached its contractual fiduciary obligations as trustee under trust indentures securing certain private placement notes. National Commerce Financial Bancorporation was awarded $ 2,226,047, a judgment that, if made final, would be in excess of Sentinel's capital and would deem the trust company insolvent. On November 16, 2000, the then Commissioner of the Tennessee Department of Financial Institutions, Bill Houston, served a Cease and Desist Order upon Sentinel, and downgraded Sentinel's composite rating from a "3" to a "5". In February of 2001, settlement negotiations took place between Sentinel and National Commerce Financial Bancorporation ("NCFB"). The judgment

was settled for $ 575,000, which prevented Sentinel from being declared insolvent. The Cease and Desist Order was lifted in the context of the Department's year 2000 report, discussed *infra*.

On January 26, 2001, the Department began an examination of Sentinel [*9] for the year ending December 31, 2000. Following the examination, a report was issued by the Department on July 17, 2001. Again, the report noted that Mr. Bates had virtually unrestricted access to all areas of the company with few compensating controls. Additionally, the report found that there was no documentation of management's reconciliation and review procedures and no third party was reviewing Mr. Bates' reconciliation of deposit accounts. The report further noted that there were inconsistencies in the accuracy of the corporate and trust records and that there was no internal audit function in place. The report specifically stated that "reconciling trust and corporate general records was difficult" and that "the accuracy of reports appears suspect due to inconsistencies in totals, as well as, the varying formats and data processing systems used." While it was noted that the "overall account administration appears generally acceptable and the company complies with the governing account instruments," the report found that guidelines and policies in regards to operations, internal controls, reconcilement of deposits and securities, balancing of accounts, information technology, [*10] audit function, investment management and contingency plan were all needed in order to prove supervision of Sentinel's corporate trust activities. Sentinel received a composite rating of "3" following the Department's examination of Sentinel's operations in 2000, and it was recommended that Sentinel be required to submit progress reports to the Department every ninety days. Once again, the

report noted that Sentinel was a grandfathered trust company and had until three years after the July 1, 1999 enactment of Public Chapter 112 to come into compliance with the noted deficiencies and violations.

On April 22, 2002, the Department began its third annual examination of Sentinel for the year ending December 31, 2001. During this examination, former Commissioner Houston was replaced by the Appellee, Kevin P. Lavender. During the course of the examination, Mr. Bates admitted that he had left $ 800,000 in assets off the Company's balance sheet when he submitted call reports to the Commissioner in an attempt to make Sentinel look less fiscally solvent while negotiating a settlement with NCFB. The report that resulted from the examination of Sentinel's 2001 operations was issued by Commissioner [*11] Lavender on February 4, 2003. The report noted, again, that Mr. Bates continued to be primarily responsible for trust operations and continued to perform the majority of the corporate operation tasks himself. The report stated that the Board of Directors of Sentinel had adopted the Federal Deposit Insurance Corporation's Statement of Principle of Trust Department Management as part of its Policy Manual. However, the report noted that Sentinel continued to operate without a formal internal audit program and that Mr. Bates continued to record and reconcile all depository accounts and handle most of the fiduciary bookkeeping without any internal review. Most notably, the report raised the issue of overdrafts in the accounts of the defaulted bond issues and noted that it was not clear as to how these overdrafts were funded. The report speculated that it appeared that the overdrafts were being funded from other bond issues and warned of the necessity of the trust company "to keep trust account assets separate," and that "the funds of one bond issue are not to be used for another

bond issue." Sentinel again received a letter written by Commissioner Lavender that accompanied the examination [*12] report, in which, the Commissioner requested that Sentinel management "provide information as to how overdrafts are currently being funded for various bond issues." On April 16, 2003, Mr. Bates wrote the Commissioner explaining funding of the overdrafts. The pertinent part of that letter reads as follows:

> Fees and expenses are charged to the appropriate principal or income cash account of trust accounts as and when the fees and expenses are incurred. As a result, a cash overdraft will occur if payment is charged to an account holding little or no actual cash assets. In virtually all cases, however, the account will have non-cash assets in the process of being converted to cash and/or may hold collectible cash apart from the trustee. . . . Each trust account is separately identified and accounted for on a stand-alone basis. Cash and investment securities are collectively held for the individual accounts. Non-fungible assets such as real property, receivables and other pledged collateral are counted as nominal assets until converted into cash and received into the account. Fees and expenses are funded from collective cash assets and charged to appropriate individual trusts. [*13]
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> * * *

> When assets are converted to cash, the overdraft is liquidated. All trust accounts should hold assets in excess of any temporary cash overdraft. Sentinel recognizes that disbursements for a trust in excess of recoverable assets are to be recorded as a corporate expense. That has been and remains its corporate policy.

On June 13, 2003, the Department began an examination of Sentinel for the year ending December 31, 2002. On July 25, 2003, the Department was informed that Sentinel's audit firm, Charles Welch and Associates, had withdrawn and declined to complete Sentinel's 2002 audit due to the inability of the accounting firm to obtain from Sentinel management evidence needed to evaluate the fair value of Sentinel's corporate fiduciary receivables. Mr. Bates then hired an independent CPA, Mr. Jim Brewer, to reconcile Sentinel's cash accounts, including the pooled fiduciary account. In response to this information, the Department sent a memo to Mr. Bates on August 8, 2003. In the memo, the Department requested explanations of several accounting issues that arose during the examination, in particular, the question of why the cash balance did not reconcile to either the [*14] fiduciary or corporate balance sheet totals or to the bank account statements. Mr. Bates responded to the Department's request in writing stating that, while the "cash balance figure reported on the Trust Department Balance Sheet does not exist as an account register," which can be examined independently of the actual trust accounts, Mr. Bates believed Sentinel's accounts were reconciled and balanced. On May 31, 2003, Mr. Bates provided an Account Reconciliation Report.

On October 6, 2003, the Commissioner met with the Board of Directors of Sentinel to inquire as to how expenses were funded for defaulted bond issues. The Commissioner also stressed the urgency for a financial statement audit of the company in order for the Commissioner to determine the solvency of Sentinel. On October 10, 2003, Mr. Bates advised the Commissioner that a new CPA firm, Kraft CPAs ("Kraft"), had been engaged to perform an audit for 2002.

On March 19, 2004, Kraft provided the Department with a copy of the audit report of Sentinel for the year ending December 31, 2002. In the report, Kraft identified approximately $ 9.4 million in fiduciary account receivables, of which approximately $ 7.5 million resulted [*15] from expenditures Sentinel had made in connection with defaulted bond issues and related unreimbursed costs and expenses. However, Kraft declined to give an opinion as to the financial status of Sentinel because Sentinel's records had been inadequate for Kraft to satisfy themselves as to the existence, amount, or collectability of the receivables. Kraft also reported that: (1) Sentinel's Trust Department and companies cash had been commingled in the same bank account, (2) Sentinel appeared to have paid company expenses from the Trust Department account and reimbursed the Trust Department at a later date, and (3) Sentinel had not been preparing an accurate reconciliation of the bank balance to the general ledger on a monthly basis but was simply adjusting the general ledger balance to the bank's monthly balance, which resulted in the company and Trust Department significantly overstating cash as of December 31, 2002.

Following the receipt of the 2002 audit report, Department examiners returned to Sentinel on March 22, 2004 to conduct

a reconciliation of the balance of the fiduciary accounts as of December 31, 2003, the balance in the pooled fiduciary account, and the overdrafts on [*16] the defaulted bond issues. This reconciliation reflected a net cash shortage in the pooled fiduciary account of $ 5,789,011. After notifying Sentinel of net cash shortage, the Department examiners met with Mr. Bates and a Kraft auditor on April 1, 2004. At the meeting, Mr. Bates asked whether the Department's analysis and resulting determination of an approximate $ 5.7 million shortfall was incorrect. Mr. Bates admitted that the $ 5,789,011 figure was close to the amount of the shortfall. However, Mr. Bates failed to bring to the Department examiner's attention the alleged existence of a substantial amount of outstanding fees owed to Sentinel that would be available to offset this cash shortage.

On April 5, 2004, the Commissioner sent a letter to Sentinel requesting an opinion of counsel regarding Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues. The Department defined this practice as follows:

> Sentinel served as the indenture trustee for various high-yield, unregistered municipal and corporate bonds. In a number of instances, the debtor had failed to make the scheduled principal and/or interest payments and the bond had [*17] been declared in default per the terms of the indenture. Sentinel, in its role as indenture trustee, would then fund various expenses relative to these defaulted issues, such as insurance, security, legal and other professional fees, in an effort to protect the value of the underlying collateral. While the

> governing indenture and/or bondholder indemnification usually provided for the reimbursement of these expenses from the proceeds from the sale of the collateral, Sentinel did not have adequate corporate liquidity to fund these expenses, in the event that the defaulted issue did not already have sufficient funds on deposit with Sentinel. Thus, in order to fund these expenses, Sentinel would "borrow" from other non-related bond issues by writing checks and/or wires on its pooled demand deposit account. . . . This practice of "borrowing" from the pooled fiduciary account to fund the expenses of the defaulted issues resulted in approximately $ 7.5 million in fiduciary account receivables that Kraft had been unable to substantiate as to their actual existence, amount or collectability.

On April 28, 2004, at a meeting with the Commission, Sentinel, and Sentinel's legal representatives [*18] from Waller, Lansden, Dortch & Davis, PLLC ("Waller Lansden"), Sentinel's legal counsel indicated that Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues was "inappropriate" and that such expenses were typically funded with corporate assets. During a meeting of the same parties on April 30, 2004, Mr. Bates admitted that his most recent calculations showed that Sentinel had a deficit fiduciary cash position of approximately $ 7.25 million. Following this meeting, the Sentinel Board of Directors adopted a new Corporate Trust Policy, which provided that, in order to avoid the loss of collateral or senior secured position, "advances may be made up to the expected liquidation value," but that "funds may not be advanced from any trust account if

it is anticipated that the advance creates an overdraft in the affected account."

On May 3, 2004, and as a result of Mr. Bates' May 3, 2004 admission that his most recent calculations showed that Sentinel had a deficit fiduciary cash position of approximately $ 7.25 million, the Commissioner issued an Emergency Cease and Desist Order and Notice of Charges against Sentinel, pursuant to T.C.A. § § 45-1-107(a)(4) [*19] , (5) and (c). n6 The Order and Notice declared that the Commissioner had determined that Sentinel was operating in an unsafe and unsound manner and ordered Sentinel to make an initial infusion of capital in the amount of $ 2 million by the close of business on May 17, 2004, in order to partially replenish the fiduciary cash deficiency. In addition, the order directed Sentinel to submit a capital plan outlining their plans to completely replenish the fiduciary pooled account and the steps to be taken to provide sufficient operating capital. On May 6, 2004, Sentinel's legal counsel from Waller Lansden advised the Sentinel Board of Directors that it was in the best interest of the trust company for the Board to ask Mr. Bates to resign as president and director of Sentinel. Furthermore, the attorneys advised the Board that, if Mr. Bates did not voluntarily resign, they would have to resign as counsel to Sentinel. Mr. Bates refused to resign and Waller Lansden subsequently resigned from its representation of Sentinel.

n6 T.C.A. § 45-1-107(a)(4), (5) and (c) read as follows:

(a) In addition to other powers conferred by this title, the commissioner has the power to:

(4) Order any person to cease violating a provision of this title or lawful regulation issued under this title;
(5) Order any person to cease and desist from engaging in any unsafe or unsound banking practice when such practice is likely to cause insolvency or dissipation of assets or earnings of a state bank or is likely to otherwise seriously prejudice the interests of the depositors of a state bank; and

(c) Notice and opportunity for a hearing shall be provided in advance of any of the foregoing actions in this section taken by the commissioner, except the formulation of regulations of general application. In cases involving extraordinary circumstances requiring immediate action, the commissioner may take such action but shall promptly afford a subsequent hearing upon application to rescind the action taken.

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On May 17, 2004, the Commissioner and Department staff met with Sentinel's new legal counsel, Mary Neil Price from the firm of Miller and Martin. Legal counsel admitted that they had not prepared the capital plan that the May 3 order of the Commissioner required because they did not have a "good enough handle on the financial situation." However, Sentinel's new legal counsel provided an outline of proposed steps in order to "improve Sentinel's financial position" and to "maximize funds available to repay any deficits in any default trust accounts for which funds are not available from other sources." These steps included: (1) certain actions to reduce Sentinel's operating expenses, (2) an attempt to accelerate collection of advanced expenses on the defaulted bond issues,

and (3) the financing of real property owned by Sentinel. Again, there was no mention in the proposed steps of the existence of substantial fees (default and administrative) owed to Sentinel that would be available to maximize funds available to repay any deficits in any default trust accounts.

On May 18, 2004, the Commissioner took emergency possession of Sentinel, pursuant to T.C.A. § § 45-2-1502 [*21] (2000); n7 and, pursuant to T.C.A. § 45-2-1502 (b)(1), filed notice in the Chancery Court of Lewis County. Due to Sentinel's failure to submit a capital plan outlining the company's plans to replenish the fiduciary pooled account and failure to make an initial infusion of $ 2 million in capital by the May 17 deadline; and in light of the record as a whole, the Commissioner determined that taking possession of Sentinel was the appropriate action necessary to protect the bond issuers and bondholders. In addition, on May 18, 2004, the Commissioner issued an order appointing Receivership Management, Inc. ("Receiver") to act as the Receiver of Sentinel pursuant to T.C.A. § 45-2-1502(b)(2).

n7 T.C.A. § 45-2-1502, Commissioner in Possession, reads in pertinent part:

> (a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:
> (1) Its capital is impaired or it is otherwise in an unsound condition;
> (2) Its business is being conducted in an unlawful or unsound manner;

(3) It is unable to continue normal operations; or
(4) Its examination has been obstructed or impeded.
(b)(1) The commissioner shall take possession by posting upon the premises a notice reciting that the commissioner is assuming possession pursuant to this section and the time, not earlier than the posting of the notice, when such possession shall be deemed to commence. A copy of the notice shall be filed in a court of general or equity jurisdiction in the county in which the institution is located. The commissioner shall notify the federal reserve bank of the district of taking possession of any state bank which is a member of the federal reserve system, and shall notify the Federal Deposit Insurance Corporation of the taking possession of any insured bank.
(2) When the commissioner has taken possession of a state bank, the commissioner shall be vested with the full and exclusive power of management and control, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate the commissioner's

possession by restoring the bank to its board of directors, to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the bank in accordance with § § 45-2-1503 and 45-2-1504. As soon as practicable after taking possession, the commissioner shall make an inventory of the assets and file a copy thereof with the court in which the notice of possession was filed.

(3) When the commissioner has taken possession, there shall be a postponement until six (6) months after the commencement of such possession of the date upon which any period of limitation fixed by a statute or agreement would otherwise expire on a claim or right of action of the bank, or upon which an appeal must be taken or a pleading or other document must be filed by the bank in any pending action or proceeding.

(c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a

review by certiorari as provided in title 27, chapter 9. (Emphasis added).

[*22]

Immediately after taking possession of Sentinel, the Receiver and Department personnel began reviewing Sentinel's records to determine an accurate assessment of Sentinel's financial status. The fact that Sentinel was using two different accounting systems (Quick Books and AccuTrust fiduciary account system) hampered the process because the entries in the two systems were not consistently reconciled with each other or with the bank statements from the pooled fiduciary account. On June 15, 2004, the Department issued a preliminary report, which stated that, as of December 31, 2003, Sentinel had a cash deficiency in the pooled fiduciary account of $ 5,789,011. In the four months between December 31, 2003 and May 18, 2004, the deficiency grew and ranged from $ 7,612,218 in Quick Books to $ 8,430,722 in the AccuTrust fiduciary accounting system. The report further reflects that, as of May 18, 2004, Sentinel had corporate assets of $ 1,389,682 and was insolvent in an amount of at least $ 6,225,445.

On June 17, 2004, the Commissioner and Department personnel met with Mr. Bates and his new attorney, Carrol Kilgore, to give them an opportunity to respond to the findings reflected in the Department's [*23] report of Sentinel's financial status or, in the alternative, to submit a written response prior to the Commissioner taking any action with respect to the report. Neither Mr. Bates nor Mr. Kilgore made any substantive changes to the report, and despite having indicated they would submit a written response by the next day,

they declined to do so. Consequently, based on the determination that Sentinel was insolvent in an amount of at least $ 6,225,000, that Sentinel did not have sufficient liquid assets to pay off its bondholders and creditors, that Sentinel did not have a viable plan for the infusion of sufficient capital to eliminate the $ 7.6 to $ 8.4 million cash deficiency in the pooled fiduciary account, and from the record as a whole, the Commission determined that liquidation of Sentinel pursuant to T.C.A. § § 45-2-1502(c)(2) n8 and 1504 n9 was necessary and appropriate. Accordingly, on June 18, 2004, the commissioner issued a Notice of Liquidation of Sentinel Trust Company.

n8 *See supra* note 9.

n9 T.C.A. § § 45-2-1504 reads:

> (a) In liquidating a state bank, the commissioner may exercise any power of the office of commissioner, but shall not, without the approval of the court in which notice of possession has been filed:
> (1) Sell any asset of the organization having a value in excess of five hundred dollars ($ 500);
> (2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars ($ 500), exclusive of interest; or
> (3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and

filing a schedule of the commissioner's determinations in accordance with this chapter.

(b) Within six (6) months of the commencement of liquidation, the commissioner may elect to terminate any executory contract under which the state bank has contracted either to receive or to provide services, such services specifically including advertising, or any obligation of the bank as a lessee. A lessor who receives sixty (60) days' notice of the commissioner's election to terminate the lease shall have no claim for rent other than rent accrued to the date of termination or for claims for damages for such termination.

(c) As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts. Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be given by registered mail to the parties by the transferee corporate fiduciary.

(d) As soon after the commencement of liquidation as practicable, the commissioner

shall send notice of the liquidation to each known depositor, creditor and lessee of a safe deposit box or bailor of property held by the bank at the address shown on the books of the institution. The notice shall also be published in a newspaper of general circulation in the community once a week for three (3) successive weeks. The commissioner shall send with the notice a statement of the amount shown on the books of the institution to be the claim of the depositor or creditor. The notice shall demand that property held by the bank as bailee or in a safe deposit box be withdrawn by the person entitled thereto and that claims of depositors and creditors, if the amount claimed differs from that stated in the notice to be due, be filed with the commissioner before a specified date not earlier than sixty (60) days thereafter in accordance with the procedure prescribed in the notice.

(e) Safe deposit boxes, the contents of which have not been removed before the date specified, shall be opened by the commissioner in the manner provided for boxes upon which the payment of rental is in default, and the sealed packages containing the contents and the certificates, together with any unclaimed property held by the bank as bailee and certified inventories thereof, shall be reported to the

state treasurer who shall deal with them in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.

(f) Within six (6) months after the last day specified in the notice for the filing of claims or such longer period as may be allowed by the court in which notice of possession has been filed, the commissioner shall:

(1) Reject any claim if the commissioner doubts the validity thereof;

(2) Determine the amount, if any, owing to each known creditor or depositor and the priority class of the claim under this chapter and chapter 1 of this title;

(3) Prepare a schedule of the commissioner's determinations for filing in the court in which notice of possession was filed; and

(4) Notify each person whose claim has not been allowed in full and publish once a week for three (3) successive weeks a notice of the time when and the place where the schedule of determinations will be available for inspection and the date, not sooner than thirty (30) days thereafter, when the commissioner will file the schedule in court.

(g) Within twenty (20) days after the filing of the commissioner's schedule, any creditor, depositor or stockholder may file

an objection to any determination made. Any objections so filed shall be heard and determined by the court, upon such notice to the commissioner and interested claimants as the court may prescribe. If the objection is sustained, the court shall direct an appropriate modification of the schedule. After filing the schedule, the commissioner may, from time to time, make partial distribution to the holders of claims which are undisputed or have been allowed by the court, if a proper reserve is established for the payment of disputed claims. As soon as is practicable after the determination of all objections, the commissioner shall make final distribution.

(h)(1) The following claims shall have priority:

1. (A) Obligations incurred by the commissioner;

(B) Wages and salaries of officers and employees earned during the three-month period preceding the commissioner's possession in an amount not exceeding six hundred dollars ($ 600) for any one (1) person;

(C) Fees and assessments due to the department; and
(D) Deposits to the extent of ten dollars ($ 10.00) for each depositor.
(2) After the payment of all other claims with interest at the maximum rate permitted on time deposits, the commissioner shall pay claims otherwise proper which were not filed within the time prescribed.
(3) If the sum available for any class is insufficient to provide payment in full, such sum shall be distributed to the claimants in the class pro rata.
(I) Any assets remaining after all claims have been paid shall be distributed to the stockholders in accordance with their respective interests.
(j) Unclaimed funds remaining after completion of the liquidation shall be transferred to the state treasurer to be dealt with in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.

> (k) When the assets have been distributed in accordance with this chapter and chapter 1 of this title, the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be relieved of liability in connection with the liquidation and the charter shall be canceled.

[*24]

Pursuant to T.C.A. § 45-2-1504(c), which requires the Commissioner to terminate all fiduciary positions held by Sentinel as soon as practicable, the Commissioner, through the appointed Receiver, sought to transfer the trustee and executor positions that Sentinel held on three personal trust accounts to new trustees or executors. On July 2, 2004, the Commissioner filed a motion seeking the approval of the Lewis County Chancery Court to transfer Sentinel's fiduciary positions on these three personal trust accounts, as well as to transfer all of the verified investments assets separately held by Sentinel on behalf of those accounts. Appellants did not object to the transfer, and an agreed order approving these transfers was entered by the Lewis County Court on July 19, 2004.

Next, the Commissioner and Receiver filed a motion seeking approval to transfer the fiduciary positions on Sentinel's remaining bond accounts not in default, and four defaulted bond accounts to successor fiduciaries. The

Appellants filed an objection to this motion on November 12, 2004. Appellants argued that the Lewis County Chancery Court lacked subject matter jurisdiction to approve [*25] the transfer of the bond issues based on the Appellants' belief that the provisions of T.C.A. § 45-2-1504 applied only to state banks, not to trust companies. A hearing on the motion was held on November 15, 2004. The trial court granted the motion of the Commissioner and Receiver approving transfer of the bond issues, and the order was entered on November 15, 2004. Further, the trial court certified the order as a final appealable order, pursuant to Tenn. R. Civ. P. 54. On November 24, 2004, the Receiver filed an announcement informing the court that the parties had agreed to transfer of the fiduciary positions on the bond issues that had been reserved from the November 15, 2004, Order and requested entry of a final order approving such transfers. An order granting that request was entered by the Lewis County Chancery Court on December 1, 2004. The Appellants filed a Notice of Appeal from the Lewis County Chancery Court's order on December 10, 2004.

Prior to the finalization of the Lewis County Chancery Court's orders transferring the fiduciary positions on Sentinel's bond accounts, the Appellants filed a petition in Davidson County Chancery Court for [*26] a writ of supersedes and common law writ of certiorari, seeking judicial review of the Commissioner's decisions to take possession of, and to liquidate, Sentinel. The Appellants argued that the Commissioner had no authority to exercise his bank regulatory powers against Sentinel because the governing statutes allowing the Commissioner the power to take possession and liquidate applied solely to banks, not to trust companies. The writ of certiorari was issued on July 1, 2004.

On July 16, 2004, Appellants filed a motion requesting an expedited hearing only on the petition for writ of supersede as. On July 16, 2004, the Commissioner filed a response to Appellants' motion stating that he had no objection to an expedited hearing on the writ of supersede as and requested that the court also expedite a hearing on the writ of certiorari. On July 27, 2004, the Commissioner filed the Administrative Record, and a response to the Appellants' motions. The Commissioner asserted that he had acted with express statutory authority in taking possession of and liquidating Sentinel, and that there was substantial and material evidence in the record to support his decisions. On August 4, 2004, the Commissioner [*27] filed a supplemental response to the petition for supersede as that included a transcript of the legislative history debates on Public Chapter 112, which the Commissioner asserted demonstrated the Legislature's understanding and intent that all the provisions of the Tennessee Banking Act would apply to state trust companies. Before a hearing could be held on the petition for writ of supersede as, on July 30, 2004, Appellants filed a supplemental petition seeking mandamus and specifically requesting an order from the Davidson County Chancery Court directing the Commissioner to cease the ongoing liquidation of Sentinel under the jurisdiction of the Lewis County Chancery Court. The mandamus petition was abandoned by Appellant. At a hearing on August 5, 2004, the Davidson County Chancery Court offered to consolidate the hearing on the request for supersede as with the writ of certiorari so that all issues before the court could be timely resolved. The Appellants, however, were not willing to agree to a consolidated hearing and sought to proceed solely on the request for supersede as, (based only upon the legal argument that the Commissioner was acting without statutory authority).

The [*28] Appellants sought the writ of supersede as because "Sentinel Trust Company is not a bank, and has none of the characteristic attributes of a bank" and argued that the statutory powers the Commissioner exercised only apply to a bank and, therefore, the Commissioner acted "illegally" and "wholly outside his administrative and policing authority." On August 9, 2004, the court issued an order denying the petition for writ of supersede as. The Davidson County Chancery Court order reads, in pertinent part, as follows:

> In 1999, the General Assembly amended the [Tennessee Banking] Act to specifically make trust companies subject to all of its provisions, not just those pertaining to fiduciaries.
>
> * * *
>
> [The] provisions of Chapter 112 make it clear the General Assembly's intent that all of Chapters 1 and 2 of Title 45 shall apply to the operation and regulation of state trust companies and that such companies shall fully comply and conform with all the provisions of these chapters.

The court did not make a finding as to the factual foundation supporting the decisions to take possession and liquidate, as such issues were not presented to the court.

On August 13, 2004, in [*29] the event that the Davidson County Court declined to vacate or revise its previous order, Appellants filed a motion with the Davidson County Chancery

Court requesting that the court: (1) vacate or revise its August 9 order, (2) enter final judgment for Appellants upon both the writs of certiorari and supersede as on the basis of the pleadings, (3) reserve to the Appellants the right to an evidentiary hearing, and (4) grant an immediate interlocutory appeal. On August 24, 2004, the trial court issued an order denying the motion requesting the court to vacate or revise its August 9, 2004 order. However, the trial court did grant Appellants permission to seek an interlocutory appeal pursuant to Rule 9 of the Tenn. R. App. P. On August 27, 2004, Appellants filed an application for permission to appeal, and on application for extraordinary appeal. On September 1, 2004, the Middle Section of the Tennessee Court of Appeals issued an order dismissing both appeals. The Order read, in pertinent part, as follows:

> Having reviewed the application and supporting documents, we cannot conclude that an interlocutory appeal is necessary to prevent irreparable harm or to prevent needless, expensive [*30] and protracted litigation. Nor can we conclude that the trial court has so far departed from the acceptable and usual course of judicial proceedings as to require immediate review under Tenn. R. App. P. 10.

Six months later, on March 4, 2005, the Appellants filed a motion with the Davidson County Chancery Court requesting that the case be transferred to the Lewis County Chancery court for hearing or, in the alternative, to set a scheduling conference so that a trial date could be set. After a status conference, the court issued an order setting a final hearing for March 29, 2005.

The court further noted that, because this was a post-seizure hearing, it would be liberal in allowing the introduction of evidence in order to insure that the hearing fully complied with the concepts of due process, despite the fact that the Appellants had waited almost eight months post-seizure to seek a hearing challenging the Commissioner's actions. Following a two-day evidentiary hearing, the court issued a memorandum and order on April 13, 2005, in which it denied the petition for writ of certiorari and dismissed the case. The memorandum and order of the court reads, in pertinent part:

> This Court [*31] was always open and ready to grant the petitioners [Appellants] a prompt post-seizure and/or post liquidation notice hearing. The failure to have a prompt post-seizure hearing challenging the factual basis for the seizure was entirely the fault of the petitioners. Petitioners' counsel in August, 2004 insisted that his legal arguments were so strong that he did not need a hearing on the facts. He insisted on a hearing limited to his argument that the banking statutes did not apply to trust companies. . . . This insistence was pressed in the face of the Court's offer to give him a final hearing on all issues within 7-10 days of August 5, 2004. When petitioners lost their legal argument in state court, they were so sure of their position that they then went to federal court where they again lost.
>
> Finally, having failed to win on their legal argument, petitioners finally in March, 2005, ten (10) months after the Commissioner took

possession, requested a hearing challenging the Commissioner's factual determinations.

> The Court continues to adhere to its decision expressed in its memorandum and order of August 9, 2004 that the banking statutes apply to trust companies and that [*32] the statutory structure allowing the Commissioner to take possession pursuant to T.C.A. § 45-2-1502(c)(1) and related statutes is constitutional.
>
> * * *
>
> The factual challenge to the Commissioner's action has now been delayed so long by the petitioners that this case is now moot. See Boyce v. Williams, 215 Tenn. 704, 389 S.W.2d 272, 277-78 (Tenn. 1965). The receivership and liquidation have proceeded now for eleven (11) months, and the record indicates that Sentinel is but an empty shell. While Humpty Dumpty could perhaps have been put back together in the Summer of 2004 [Sentinel] can no longer be put back together.

Furthermore, the court found that, if it were to reach the factual merits, it would affirm the actions of the Commissioner. The court stated that the facts support the conclusion of the Commissioner that an emergency existed, that the money in the pooled trust account belonging to the bond holders was in immediate danger, and that the record supported the Commissioner's decision to liquidate. The Appellants filed a

Notice of Appeal from the Davidson County Chancery Court's order on April 19, 2005.

As part of the [*33] continuing liquidation of Sentinel, the Commissioner and Receiver filed a motion with the Lewis County Chancery Court on May 2, 2005, seeking an approval of the sale of the Sentinel Trust Bellevue, Tennessee property ("Bellevue Property"), pursuant to T.C.A. § 45-2-1504(a)(1). T.C.A. § 45-2-1504(a)(1) states that, in liquidating a state-chartered trust company, court approval would be needed to sell an asset of the trust company having a value of in excess of Five Hundred Dollars ($ 500). This property was titled in the name of Sentinel Trust Company and was being used as an office location for conducting the business of Sentinel. On May 26, 2005, Appellant Bates filed an objection to the sale, alleging again that the Commissioner lacked authority. The Lewis County Court held a hearing on May 26, 2005 and issued an order that same day granting the sale of the Bellevue Property and certified the order as final pursuant to Tenn. R. Civ. P. 54.02. Mr. Bates filed a Notice of Appeal on June 14, 2005, and the appeal was docketed in the court as a separate appeal from the pending Lewis County case. No motion for stay was filed with [*34] the court to postpone the sale, and, as a result, the sale of the Bellevue Property closed on July 8, 2005.

On appeal, the Appellants present several issues for review, which we have rephrased as follows:

1. Whether the Tennessee Banking Act is unconstitutional on its face by vesting in the Commissioner, a member of the Executive Branch

of the government, powers which may be vested only in the judiciary, including the appointment of receivers, remove corporate directors, declare corporations insolvent?

2. Whether the trial court erred when it held that the Tennessee Banking Act applies to the trust companies and whether the Commissioner exceeded his jurisdiction or acted illegally in taking possession of Sentinel Trust Company?

XX 3. Whether there exists substantial or material evidence in the record to support the Commissioner's decision to take possession of Sentinel Trust Company and subsequent decision to liquidate the company?

4. Whether the chancery court properly issued orders approving a transfer of Sentinel's fiduciary positions to successor trustees?

5. Whether, pursuant to the Tennessee Banking Act, the Commissioner had authority to retain the fiduciary [*35] positions as to defaulted bond issues, while transferring non-defaulted bond issues?

6. Whether the commissioner has the authority to sell the Bellevue Property upon approval of the receivership court?

7. Whether the receivership court erred in approving the sale of the Bellevue Property for $ 320,000?

8. Whether the trial court erred when it denied the petition for a writ of certiorari, declaring the case moot?

In summary, the Appellants' primary arguments are that the Tennessee Banking Act does not apply to trust companies, and that the Commissioner exceeded his jurisdiction when he took possession of Sentinel Trust Company. The remaining issues are extensions of these primary questions.

1. Whether the Tennessee Banking Act is unconstitutional on its face by vesting in the Commissioner, a member of the Executive Branch of the government, powers which may be vested only in the judiciary, including the appointment of receivers, remove corporate directors, declare corporations insolvent?

The Appellants assert that T.C.A. § 45-2-1502 violates the separation of powers provision of Art. II, § 2 of the Tennessee Constitution. [*36] Specifically, Appellants contend that the fact that the statute allows the Commissioner to place a trust company in receivership (and other such related duties) is a judicial power vested solely in the Courts of Tennessee. Appellants argue that the power to impose a receivership is, and has always been, one of the powers vested solely in the judicial branch of the Tennessee government, and that any

statute that vests this power in any member of the executive or legislative departments is unconstitutional. The Commissioner argues that there is a distinct difference between the power to institute a court-created equity receivership and the power to institute an administrative receivership, and that the power to institute an administrative receivership is clearly one that is vested in the executive branch of government.

The Tennessee Constitution states that "the powers of the government shall be divided into three distinct departments; the Legislature, Executive and Judicial," and that "no person or persons belong to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tennessee Constitution, [*37] art. II, § § 1 and 2. In ***Richardson v. Tennessee Board of Dentistry,*** 913 S.W.2d 446 (Tenn. 1995), the Tennessee Supreme Court further defines the roles of the governmental branches stating that "the legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law." ***Id.*** at 453. While the departments of government have been characterized as "independent" and "coequal," they have also been viewed as "interdependent" because their functions overlap. ***Summers v. Thompson,*** 764 S.W.2d 182, 189 (Tenn. 1988); ***State v. King,*** 973 S.W.2d 586, 588 (Tenn. 1998); ***Underwood v. State,*** 529 S.W.2d 45, 47 (Tenn. 1975). As stated in ***House v. Creveling,*** 147 Tenn. 589, 250 S.W. 357 (Tenn. 1923), as a matter of practice, it has been found impossible to entirely preserve the theoretical lines between the three departments of government. Official powers are commonly conferred on administrative officers, boards and commissions. ***Woods v. State,*** 130 Tenn. 100,169 [*38] S.W.

558, 559 (Tenn. 1914). So, the fact that limited judicial or legislative power may be conferred upon an executive or administrative officer would not necessarily affect the validity of a statute. ***See, e.g., Bank of Commerce & Trust Co. v. Senter,*** 149 Tenn. 569, 260 S.W. 144, 151 (Tenn. 1924). A legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of the government. ***Underwood v. State,*** 529 S.W.2d at 47.

It is a fundamental rule of law that the departments, agencies, and commissions of government have no inherent or common-law power of their own. ***General Portland, Inc. v. Chattanooga Hamilton County Air Pollution Control Bd.,*** 560 S.W.2d 910, 914 (Tenn. Ct. App. 1976). They are purely creatures of statute. Accordingly, governmental agencies have only those powers expressly granted by statute and those powers required by necessary implication to enable them to fulfill their statutory mandate, and the statutes should be construed liberally since they are remedial in nature. ***Sanifill of Tenn., Inc. v. Tennessee Solid Waste Disposal Control Bd.,*** 907 S.W.2d 807, 810 (Tenn. 1995); [*39] ***Tennessee Pub. Serv. Comm'n v. Southern Ry.,*** 554 S.W.2d 612, 613 (Tenn. 1977). Actions taken by a governmental agency without the required authority are nullities. ***Sanifill of Tennessee, Inc.,***907 S.W.2d at 810.

The General Assembly is empowered to confer on the Commissioner of the Tennessee Department of Financial Institutions only those judicial powers reasonably necessary as an incident to the accomplishment of the purposes for which the Department of Financial Institutions was created. The purpose of the "Tennessee Banking Act" is, *inter alia*, to

provide for the sound conduct of the regulated businesses and the conservation of their assets. ***See*** T.C.A. § 45-1-102 (2000). The statute further provides:

> (d) The purposes of this chapter and chapter 2 of this title shall constitute standards to be observed by the commissioner of financial institutions in the commissioner's exercise of authority under this chapter and chapter 2 of this title, and shall constitute rules of construction in all matters of construction and application of those chapters.

T. C. A. § 45-1-102(d) [*40] .

T.C.A. § 45-2-1502 authorizes the Commissioner to take possession of a trust company if he finds that certain circumstances exist. Furthermore, the statute provides that, when the commissioner has taken possession of a trust company, "the commissioner shall be vested with the full and exclusive power of management and control, including the power . . . to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the bank in accordance" with specific provisions of the Tennessee Banking Act. We find that the powers enumerated in T.C.A. § 45-2-1502 authorizing the Commissioner to appoint a receiver, to remove corporate directors, and the power to declare corporations insolvent are powers required to enable the Commissioner to fulfill his statutory mandate under T. C. A. § 45-1-102. The powers bestowed upon the Commissioner are limited to those judicial

powers reasonably necessary as an incident to the accomplishment of the purposes for which the Department of [*41] Financial Institutions was created. Therefore, we find that T.C.A. § 45-2-1502 does not violate the separation of powers provision of Art. II, § 2 of the Tennessee Constitution.

> 2. Whether the trial court erred when it held that the Tennessee Banking Act applies to the trust companies and whether the Commissioner exceeded his jurisdiction or acted illegally in taking possession of Sentinel Trust Company?

The trial court concluded that the Tennessee banking laws codified in Chapters 1 and 2 of Title 45 of the Tennessee Code apply to trust companies. In order to determine whether the trial court's conclusion was in error, we must delve into the construction of T.C.A. § 45-1-124, (and in particular the provisions of the 1999 amendments to that statute) and T.C.A. § 45-2-1502. The Tennessee Banking Act was first adopted by the Tennessee General Assembly in 1969. Originally, the Act only required that all state banks be operated in accordance with its provisions. However, in 1980, the General Assembly amended the Act to expand the scope of its application as follows:

> Provided, however, [*42] a state bank or trust company whose purposes and powers are limited to fiduciary purposes and powers shall be subject only to the provisions pertaining to fiduciaries in Chapters 1 through 11 of this title and such other provisions of said chapters as the Commissioner

determines are reasonably necessary for the sound operation of such banks or trust companies.

T.C.A. § 45-1-124 (1980).

In 1999, as discussed *supra*, the General Assembly again amended the Banking Act through the enactment of Public Chapter 112, which further revised T.C.A. § 45-1-124. Specifically, the General Assembly modified T.C.A. § 45-1-124(d) by adding the language and punctuation "trust companies." In addition, subsection (b) was completely modified, and subsections (e) through (h) were added. Following the 1999 Amendments, § 45-1-124 reads, as follows (with amendments in bold):

> (a) The existence of state banks formed or existing on April 2, 1969, shall not be impaired by the enactment of this chapter and chapter 2 of this title, or by any change in the requirements for the formation of state banks, or by any [*43] amendment or repeal of the laws under which they were formed or created, and except as otherwise expressly provided in those chapters, the repeal of a prior act or acts by those chapters shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.
>
> **(b) To the full extent consistent with such rights, liabilities, and penalties, all state banks and, to the extent applicable, all banks, shall hereafter be operated in accordance with the**

provisions of this chapter and chapter 2 of this title. Unless the commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers.

(c) All powers granted in this chapter and chapter 2 of this title may be freely exercised by any corporation, which is empowered by its charter under any prior act of the general assembly and any amendments thereto, to exercise the rights and powers which appertain and belong to a banking institution or to conduct a general banking [*44] business, without the necessity of amending its charter, unless such charter expressly prohibits the exercise of such powers.

(d) Except to the extent inconsistent with or contrary to specific provisions of chapters 1, 2 and 3 of this title, Tennessee state banks, **trust companies,** savings and loan associations, and savings banks, and their directors, officers and shareholders shall be governed by and subject to the Tennessee Business Corporation Act, compiled in title 48, chapters 11-27, as the same may be amended from time to time, and successor statutes thereto. The commissioner has the authority to interpret the Tennessee Business Corporation Act as it applies to financial

institutions subject to regulation by the commissioner.

(e) The charter of a trust company granted by the commissioner shall not be void due to the enactment of any amendment or repeal of the laws under which it was formed if such trust company is in operation, as determined by the commissioner, on July 1, 1999.

(f) A company engaged in activities subject to chapters 1 and 2 of this title, on July 1, 1999, but formed, as determined by the commissioner, prior to the enactment of Acts 1980, [*45] ch. 620, and not previously subject to regulation by the commissioner, may continue to act as a fiduciary without submitting an application. However, such entity shall be otherwise fully subject to chapters 1 and 2 of this title.

(g) A company authorized by its charter, prior to the enactment of Acts 1980, ch. 620, to engage in fiduciary activities, but not engaging in fiduciary activities on July 1, 1999, must file the appropriate application to establish a trust company and then fully comply with chapters 1 and 2 of this title.

(h) All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and

prudent to conform to the requirements of chapters 1 and 2 of this title and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999. During this period of time, to conform to the requirements of chapters 1 and 2 of this title, the commissioner may conduct examinations at such company's expense, and apply the requirements of chapters 1 and 2 of this title as deemed appropriate.

T. C. A. § 45-1-124 (1999). *See also* Public Acts Ch. [*46] 112.

It is well settled that the interpretation of statutory law is a judicial function. ***See, e.g., State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle***, 63 S.W.3d 734, 754 (Tenn. Ct. App. 2001) (citations omitted). When interpreting a statute, the role of the Court is to "ascertain and give effect to the legislative intent." ***Sharp v. Richardson***, 937 S.W.2d 846, 850 (Tenn. 1996). In the absence of ambiguity, legislative intent is derived from the face of the statute, and the Court may not depart from the "natural and ordinary" meaning of the statute's language. ***Davis v. Reagan***, 951 S.W.2d 766, 768 (Tenn. 1997); ***Westland West Community Assoc. v. Knox County***, 948 S.W.2d 281, 283 (Tenn. 1997).

The Appellants argue that, because the General Assembly did not add the designation "trust companies" in each individual section of Chapters 1 and 2 of Title 45, when it amended the statute in 1999, that trust companies are only subject to the Commissioner's regulation where "trust

company" is expressly included or under those provisions pertaining specifically to fiduciaries. Appellants [*47] assert that "no statute provides that the term 'bank' includes 'trust company' with reference to any other provisions of the Tennessee Banking Act." Therefore, Appellants argue that the Commissioner has no authority to exercise any of his "bank regulatory powers" against Sentinel, a non-banking trust company. Specifically, the Appellants contend that, because T.C.A. § 45-2-1502 n10 (which authorizes the Commissioner to take possession of a "state bank" in certain circumstances) does not include the term "trust company," the Commissioner has no authority to take possession of a trust company under the statute. Consequently, Appellants assert that the Commissioner exceeded his jurisdiction, or acted illegally, when he took possession of Sentinel pursuant to the provisions of T.C.A. § 45-2-1502.

n10 For the complete text of T.C.A. § 45-2-1502, *see supra* note 7.

The Commissioner argues that the Appellants misconstrue the clear [*48] and complete language of T.C.A. § 45-1-124, and instead ask this Court to focus solely on the definition of "state bank" to the exclusion of all other provisions. The Commissioner argues that the intent of the General Assembly is clearly set forth in Public Chapter 112, T.C.A. § 45-1-124, which states that "***the provisions of Title 45, Chapters 1 and 2 and the rules thereof shall also apply to the operation and regulation of state trust companies*** and banks whose purposes and powers are limited to fiduciary purposes and powers" (emphasis added). Because T.C.A. § 45-2-1502 is a provision

contained within Chapter 2 of Title 45, the Commissioner asserts that the statutory language applies to the operation and regulation of Sentinel.

The trial court found that the provisions of Chapter 112 "make it clear the General Assembly's intent that all of Chapters 1 and 2 of Title 45 shall apply to the operation and regulation of state trust companies and that such companies shall fully comply and conform with all the provisions of these chapters, not just the provisions pertaining to fiduciary activities. [*49] " We agree with the trial court's determination. We find that the statute is not ambiguous and that the Legislature's intent to bring state trust companies under the umbrella of the Tennessee Banking Act is clear from the plain and ordinary meaning of the statutory language. *See* T.C.A. § 45-1-124(b) and (d). Moreover, the addition of T.C.A. § 45-1-124(h) granting "all state trust companies operating . . . a period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of chapters 1 and 2 of this title and the regulations thereunder" is further evidence of the Legislature's intent to expand the reach of the Tennessee Banking Act to encompass trust companies. Therefore, T.C.A. § 45-2-1502, which authorizes the Commissioner to take possession of a state bank under certain circumstances, also vests in the Commissioner the full authority to take possession of a Tennessee trust company under the same set of circumstances. n11

n11 In the absence of ambiguity, as in the present case, legislative intent is derived from the face of a statute, and the Court may not depart from the "natural and ordinary" meaning of the statute's language.

However, we have reviewed the legislative history of Public Chapter 112 and find that the intent of the legislature expressed therein fully supports the interpretation as expressed by the trial court and this Court on review.

[*50]

3. Whether there exists substantial or material evidence in the record to support the Commissioner's decision to take possession of Sentinel Trust Company and subsequent decision to liquidate the company?

The Commissioner took emergency possession of Sentinel on May 18, 2004. Appellants argue that the financial condition of Sentinel was not sufficiently impaired to warrant the Commissioner's action. Specifically, Appellants argue that there was no risk of serious losses to the depositor. Because emergency possession was allegedly not warranted, the Appellants contend that the Commissioners actions denied Appellants their right to a pre-possession hearing.

T.C.A. § 45-1-1502(a) provides that the Commissioner may take possession of a state bank or trust company if he finds one of the following four criteria are met:

(1) Its capital is impaired or it is otherwise in an unsound condition;
(2) Its business is being conducted in an unlawful or unsound manner;

(3) It is unable to continue normal operations; or
(4) Its examination has been obstructed or impeded.

The Commissioner may take emergency possession of a state bank or trust company, without a preliminary [*51] hearing, if the additional criterion stated in T.C.A. § 45-1-1502(c)(1) exists:

> If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.

The writ of certiorari is not available as a matter of right; its grant or denial is within the sound discretion of the trial court, and will not be reversed on appeal unless there is abuse of that discretion. ***Boyce v. Williams,*** 215 Tenn. 704, 389 S.W.2d 272, 277 (Tenn. 1965). Further, the scope of review under the common law writ of certiorari is very narrow. It does not involve an inquiry into the intrinsic correctness of the decision of the tribunal below, but only into the manner in which the decision was reached. T.C.A. § 27-8-101. ***See, also, Robinson v. Clement,*** 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001) (citing ***Arnold v. Tennessee Bd. of Paroles,*** 956 S.W.2d 478, 480 (Tenn. 1997)); [*52] ***Watts v. Civil Serv. Bd. for Columbia,*** 606 S.W.2d 274, 277 (Tenn. 1980); ***421 Corp. v.. Metropolitan***

Gov't, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000); ***Hoover, Inc. v. Metropolitan Bd. Of Zoning Appeals,*** 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996)***; Powell, v. Parole Eligibility Review Bd.,*** 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). Thus, in the case at bar, under the standard of review for the common law writ, if there is substantial or material evidence in the record to support the existence of any one of the conditions set out in T.C.A. § 45-1-1502(a), and if there is also sufficient evidence that an emergency existed, which would have resulted in serious losses to the depositors, then the Commissioner's decision to take possession of Sentinel will be upheld.

In its "Notice of Possession of Sentinel Trust Company" filed with the Chancery Court of Lewis County on May 18, 2004, the Commissioner provided the following as a basis for the possession of Sentinel:

> 1. Sentinel Trust Company ("Sentinel") is a Tennessee corporation engaged in fiduciary activities and subject to regulation by the [*53] Commissioner under the Tennessee Banking Act pursuant to Tenn. Code Ann. § 45-1-124.
> 2. On May 3, 2004, the Commissioner issued an Emergency Order directing Sentinel to cease and desist from engaging in unsafe and unsound banking practices. That Order found that Sentinel had used pooled fiduciary funds to provide operating capital for non-related defaulted bond issues, thereby creating a fiduciary cash shortfall that greatly exceeds Sentinel's current operating capital and that Sentinel had failed to reconcile fiduciary cash and corporate cash accounts in a

timely and accurate fashion and to keep accurate books and records.

3. Efforts to infuse sufficient capital have been unsuccessful. Sentinel's potential liability for the cash shortfall in the pooled fiduciary account exceeds its current capital level. Furthermore, Sentinel has been unable to provide the Tennessee Department of Financial Institutions with a capital plan as required by the Emergency Cease and Desist Order to demonstrate how Sentinel could make the pooled fiduciary account whole.

Accordingly, the Commissioner took possession of Sentinel based upon the existence of the condition stated [*54] in T.C.A. § 45-1-1502(a)(1), that being Sentinel's business was being conducted in an unsound manner. Specifically, the record reflects that Sentinel used pooled fiduciary funds to provide operating capital for non-related, defaulted bond issues, thereby creating a fiduciary cash shortfall that greatly exceeded Sentinel's current operating capital. Even Sentinel's own counsel conceded that Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues was "inappropriate." On April 30, 2004, Mr. Bates, by his own admissions, stated that his calculations showed that Sentinel had a deficit fiduciary cash position of approximately $ 7.25 million. The record reflects that, as early as the Department's report for Sentinel's year ending December 31, 1999, the trust company had failed to reconcile fiduciary cash and corporate accounts in an accurate fashion and to keep accurate books and records in accordance with industry standards and Department regulations. Additionally, Sentinel had failed to submit a capital plan outlining the company's plans to replenish the fiduciary pooled account, and had failed to make an initial infusion of $

2 million in capital [*55] by the May 17 deadline, as required by the Emergency Cease and Desist Order filed on May 3, 2004.

In their arguments, Appellants never deny that the above conditions existed at the time the Commissioner took possession of Sentinel. Rather, Appellants admit that Sentinel's practice of borrowing monies on deposit in the pooled fiduciary account from non-related bond issues to fund the expenses of defaulted bond issues resulted in a significant deficiency in cash in the pooled fiduciary account. Moreover, Mr. Bates specifically admitted that he used the total cash held by the trust department (i.e. monies deposited in trust to be used for the purposes specified in the indenture) in a manner that was contrary to the indentures that governed Sentinel's actions as trustee. By their own admissions, prior to the Commissioner's taking possession of Sentinel, Appellants were engaging in practices that not only violated the Tennessee Banking Act, but also violated the FDIC's Statement of Principles of Trust Department Management, which Sentinel adopted as part of its corporate policies. Furthermore, these practices violated the indentures and contractual agreements between the bond issuers and [*56] Sentinel as fiduciary. From the record before us, we conclude that there is ample material evidence to indicate that Sentinel's business was being conducted in an unsound manner. Consequently, the actions of the Commissioner in taking possession of Sentinel on May 18, 2004 were justified.

We now turn to the question of whether there is sufficient material evidence in the record to support the Commissioner's decision to take emergency possession of Sentinel without a prior hearing pursuant to T.C.A. § 45-2-1502(c)(1). The statute

states that, when "an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing." The Appellants argue that the Commissioner lacked authority to take possession of Sentinel under the emergency status for two reasons. First, because Sentinel is not a "bank" and, secondly, because Sentinel does not have any "depositors." Based upon the foregoing discussion, Appellants' argument that a trust company is not a bank and may not be substituted in the Tennessee Banking Act for a bank is misplaced. As discussed, *supra*, chapters 1 and 2 of the [*57] Tennessee Banking Act also apply to trust companies. Therefore, T.C.A. § 45-2-1502, which authorizes the Commissioner to take possession of a state bank under certain circumstances, also vests in the Commissioner the full authority to take possession of a Tennessee trust company under those same set of circumstances. Under T.C.A. § 45-2-1502, the question is whether there is sufficient material evidence in the record, from which we may conclude that potential for a serious loss to depositors existed. With deficits in Sentinel's pooled fiduciary account in excess of $ 7 million, bond issuers were certainly at risk of serious losses. We find that sufficient material evidence exists to support the Commissioner's decision to take emergency possession of Sentinel Trust Company.

We must also determine whether there is sufficient material evidence in the record to support the Commissioner's decision to liquidate Sentinel. While T.C.A. § 45-2-1502 sets out the specific grounds that must be met in order for the Commissioner to take possession of a bank or trust company, the statute does not enumerate criteria [*58] that must be met before the Commissioner may or should, liquidate. Rather,

T.C.A. § 45-2-1502 (b)(2) leaves the decision of liquidation to the discretion of the commissioner, to wit:

> When the commissioner has taken possession of a state bank, the commissioner shall be vested with the full and exclusive power of management and control, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate the commissioner's possession by restoring the bank to its board of directors, to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the bank in accordance with § § 45-2-1503 and 45-2-1504. As soon as practicable after taking possession, the commissioner shall make an inventory of the assets and file a copy thereof with the court in which the notice of possession [*59] was filed.

T. C. A. § 45-2-1502 (b)(2).

This Court's scope of review is the same as in the trial court: to review the findings of fact of the Commissioner upon the standard of substantial and material evidence. ***DePriest v.***

Puett, 669 S.W.2d 669, 673 (Tenn. Ct. App. 1984). The evidence before the Commissioner must be such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration. ***Pace v. Garbage Disposal Dist.,*** 54 Tenn. App. 263, 390 S.W.2d 461, 463 (Tenn,. 1965).

Department representatives and the Receiver submitted a preliminary report on June 15, 2004, which indicated that Sentinel had a fiduciary cash deficiency ranging between $ 7.6 and $ 8.4 million. Further, the report indicated that Sentinel was operating at a net loss and was insolvent at least in the amount of $ 6.2 million. The findings in the reports, coupled with the fact that the Sentinel Board of Directors and officers had no viable plan for infusion of capital, support the Commissioner's determination that liquidation [*60] of the company was necessary.

Despite the fiduciary cash deficiency, Appellants argue that the trust company was not insolvent at that time of liquidation. However, the evidence strongly preponderates against the Appellants' depiction of the stability of Sentinel at the time the Commissioner decided to liquidate the trust company. The record reflects that Mr. Bates himself confirmed that the pooled fiduciary account had a cash deficiency of $ 5,789,011 as of December 31, 2003 and a deficiency of approximately $ 7.25 million as of April 30, 2004. Given the fact that Sentinel's net worth was $ 1.3 million, the extent of the cash deficiency was itself sufficient evidence for the Commissioner to determine that liquidation was necessary and appropriate. Moreover, the record contains additional evidence to support a decision to liquidate. Sentinel's fee revenues were

not sufficient to cover the operating expenses of the company. This resulted in a net loss of $ 163,501 for the first four months of 2004. The trust company did not maintain monetary reserves to correspond to the risk associated with the fiduciary activities they had undertaken. Furthermore, Sentinel had no formal or written [*61] business plan to guide them, nor any means to provide for a infusion of capital. The evidence before the Commissioner of an admitted multi-million fiduciary cash deficiency well in excess of Sentinel's net worth, the company's poor earning performance, the lack of any reserve in relation to losses, current operation at a net loss, and no plan or means of how the company would eliminate the deficiencies, provide a sound basis for the Commissioner's decision to liquidate Sentinel.

4. Whether the chancery court properly issued orders approving a transfer of Sentinel's fiduciary positions to successor trustees?

Appellants challenge the validity of the orders approving the transfer of Sentinel's fiduciary positions to successor trustees on several grounds. First, Appellants argue that the Tennessee Banking Act does not authorize the Commissioner or the courts to transfer assets of trust companies, only state banks. As discussed, *supra*, the provisions of Public Chapter 112 clearly indicate the General Assembly's intent that all of Chapters 1 and 2 of Title 45 of the Tennessee Code apply to the operation and regulation of state trust companies. In particular, T.C.A. § 45-2-1504(c) [*62] states that, after commencement of the liquidation of a financial institution, "the Commissioner **shall** take the necessary steps to terminate all fiduciary positions held by [the institution]." (emphasis added).

Specifically, the statute states that such "fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary...." T.C.A. § 45-2-1504(c). Consequently, the plain language of T.C.A. § 45-2-1504(c) authorizes the Commissioner to transfer Sentinel's fiduciary positions to successor trustees.

The Appellants next assert that the Tennessee Banking Act is unconstitutional in that it violates the separation of powers requirement of the Tennessee Constitution. However, as discussed, *supra*, the powers bestowed upon the Commissioner by this statute are limited to those judicial powers reasonably necessary to the accomplishment of the purposes for which the Department of Financial Institutions was created. Consequently, T.C.A. § 45-2-1504 does not violate the separation of powers provision of Art. II, § 2 of the Tennessee Constitution.

Finally, the Appellants [*63] argue that the Tennessee Banking Act simply does not give the Lewis County Chancery Court jurisdiction "to permit or forbid the transfer of trust assets," including the removal and appointment of substitute trustees. Based upon this assertion, the Appellants contend that the Lewis County Chancery Court's orders approving the transfer of Sentinel's fiduciary positions are void for lack of jurisdiction.

Once the Commissioner determines that liquidation of a financial institution is necessary, such liquidation is governed by the provisions of T.C.A. § 45-2-1504. Under the statute, the Commissioner is authorized to do any of the following:

(1) Sell any asset of the organization having a value in excess of five hundred dollars ($ 500);
(2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars ($ 500), exclusive of interest; or
(3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of the commissioner's determinations in accordance with this chapter.

T.C.A. § 45-2-1504(a). However, before taking [*64] any of the enumerated actions, the Commissioner, under subsection (a), must obtain approval of the court in which the notice of possession has been filed.

T.C.A. § 45-2-1504(c) further requires the Commissioner to take the following action:

As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts. Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be

given by registered mail to the parties by the transferee corporate fiduciary.

Appellants argue that because subsection (c) does not require the Commissioner to seek court approval in the termination of fiduciary positions, the Lewis County Chancery Court had no authority to approve the transfer of Sentinel's fiduciary positions. However, the Appellants construction of the statute ignores the dictates set forth in subsection [*65] (a). This section not only permits, but also requires the court's approval before the Commissioner may "sell any asset of the organization having a value in excess of five hundred dollars." The transfer of Sentinel's fiduciary positions represents a transfer of Sentinel's right to receive, among other revenue, trustee administration fees and paying agent fees. The record indicates that the Appellants themselves characterize the rights to receive these fees as an asset in excess of $ 4 million. For the foregoing reasons, the Lewis County Chancery Court had clear statutory authority to rule upon the Commissioner's motion to transfer Sentinel's fiduciary positions to successor fiduciaries.

5. Whether, pursuant to the Tennessee Banking Act, the Commissioner had authority to retain the fiduciary positions as to defaulted bond issues, while transferring non-defaulted bond issues?

Appellants challenge the transfer of Sentinel's fiduciary positions to successor trustees on the grounds that such transfers must include all of Sentinel's fiduciary positions, as opposed to just the non-defaulted bond issues. Because the Appellants did not raise this issue in the trial court, it will [*66]

not be considered on appeal. It is well settled that issues not presented to the trial court may not be presented for the first time on appeal. ***Smith v. Harriman Util. Bd.***, 26 S.W.3d 879, 887 (Tenn. Ct. App. 2000). This Court has appellate jurisdiction only. ***Foley v. Dayton Bank & Trust***, 696 S.W.2d 356, 359 (Tenn. Ct. App. 1985) (citing T.C.A. § 16-4-108 (1980)). Consequently, this Court may only decide issues which were brought to the attention of the trial judge, "and acted upon or pretermitted by him." ***Clement v. Nichols***, 186 Tenn. 235, 209 S.W.2d 23, 24 (Tenn. 1948). The record before this Court contains no indication that this issue proffered by the Appellants in this appeal was raised to the trial court below. However, even if we were to address this issue, we note that the plain language of T.C.A. § 45-2-1504(c) does not require that the Commissioner transfer all of an organization's fiduciary positions, only that the Commissioner "take all necessary steps to terminate all fiduciary positions" held by the organization.

> 6. Whether the commissioner [*67] has the authority to sell the Bellevue Property upon approval of the receivership court?

Appellants challenge the authority of the Commissioner to sell Sentinel's Bellevue Property on several grounds. First, Appellants argue that the Tennessee Banking Act does not authorize the Commissioner or the Receiver to sell assets of trust companies, only state banks. As stated, *supra*, the provisions of Public Chapter 112 indicate the General Assembly's intent that all of Chapters 1 and 2 of Title 45 of the Tennessee Code apply to the operation and regulation of state trust companies. T.C.A. § 45-2-1504 outlines the process for liquidating a financial institution under the Tennessee Banking

Act. The statute specifically states that the Commissioner may sell **any** asset of the organization. T.C.A. § 45-2-1504(a) (emphasis added). Consequently, the Commissioner, and his appointed Receiver, were authorized, under to T.C.A. § 45-2-1504, to sell Sentinel's Bellevue Property upon approval of the receivership court.

Again, Appellants assert that the Tennessee Banking Act is unconstitutional in that it [*68] violates the separation of powers requirement of the Tennessee Constitution by granting the Commissioner the power to appoint a receiver and liquidate assets of a trust company. Appellants contend that, because the Tennessee Banking Act vests in the Commissioner (a member of the Executive branch of the state government) powers that allegedly may be vested only in the judiciary, the Act is unconstitutional. However, as discussed *supra*, the powers bestowed upon the Commissioner are limited to those judicial powers reasonably necessary to the accomplishment of the purposes for which the Department of Financial Institutions was created. Therefore, T.C.A. § 45-2-1504 does not violate the separation of powers provision of Art. II, § 2 of the Tennessee Constitution.

7. Whether the receivership court erred in approving the sale of the Bellevue Property for $ 320,000?

Appellants contend that trial court erred in approving the sale of Sentinel's Bellevue Property. Specifically, Appellants assert that the $ 320,000 price approved by the receivership court was below the fair market price, and that the court should have "required an appraisal at market [*69] value." However,

the Appellants present no evidence to support a finding that the fair market value of the property is anything other than the $ 320,000 for which it was sold. The Appellants merely argue that the sale was a "forced sale" and should not have been approved. The Commissioner and Receiver state that the sale of the Bellevue was not a forced sale. The evidence supports the Commissioner and Receiver's position that it was a full list value sale at a fair market value set by a reputable real estate agent. In particular, the $ 320,000 list price for the Bellevue Property was set by a Nashville real estate agent after review of comparables, property condition, and property location. The property was listed for six months prior to its sale, and the property had a tax assessment value of $ 291,000.

Next, the Commissioner and Receiver assert that they are not prevented, in liquidating assets, from seeking and gaining court approval of the sale of an asset simply because the Appellants' expectations of what a fair market value might bring was not obtained from the sale transaction. T.C.A. § 45-2-1504 outlines the process that the Commissioner must [*70] follow in order to liquidate a financial institution. T.C.A. § 45-2-1504(a) states that the "commissioner may exercise any power of the office of commissioner, but shall not, without the approval of the court in which notice of possession has been filed (1) sell any asset of the organization having a value in excess of five hundred dollars." T.C.A. § 45-2-1504(a)(1). This is the only restriction placed upon the Commissioner or his appointed Receiver in the execution of a sale of a financial institutions assets. The Appellants are attempting to prevent the receivership court from approving a sale of assets, without proof that the sale price is one equivalent to a "fair market value." This requirement simply does not exist in the statute. Nonetheless, the question is moot because the record reflects

that the sale of the Bellevue Property for $ 320,000 was a fair and reasonable amount.

> 8. Whether the trial court erred when it denied the petition for a writ of certiorari, declaring the case moot?

On April 13, 2005, the Davidson County Chancery Court denied the Appellants' petition for writ of certiorari and declared [*71] the case moot. The trial court's order, filed the same day, reads in pertinent part, as follows:

> This Court was always open and ready to grant the petitioners [Appellants] a prompt post-seizure and/or post-liquidation notice hearing. The failure to have a prompt post-seizure hearing challenging the factual basis for the seizure was entirely the fault of the petitioners. Petitioners' counsel in August, 2004 insisted that his legal arguments were so strong that he did not need a hearing on the facts. He insisted on a hearing limited to his argument that the banking statutes did not apply to trust companies. . . . This insistence was pressed in the face of the Court's offer to give him a hearing on all issues within 7-10 days of August 5, 2004. When petitioners lost their legal argument in state court, they were so sure of their position that they then went to federal court where they again lost. Finally, having failed to win on their legal argument, petitioners finally in March 2005, ten (10) months after the Commissioner took

> possession, requested a hearing challenging the Commissioner's factual determinations.
>
> * * *
>
> The factual challenge to the Commissioner's action [*72] has been delayed so long by the petitioners that this case in now moot. . . . The receivership and liquidation have proceeded now for eleven (11) months, and the record indicates that Sentinel is but an empty shell. While Humpty Dumpty could perhaps have been put back together, in the Summer of 2004 [Sentinel] can no longer be put back together.

The Appellants assert that because "there is in this record no evidence that any of Sentinel's assets have been conveyed away beyond redemption," this Court can reverse the trial court's approval of Sentinel's liquidation. Appellants seek an order from this Court directing the Commissioner to return Sentinel to its status as of May 18, 2004 (i.e. prior to possession by the Commissioner).

Our analysis is guided by our Supreme Court's decision in ***Boyce v. Williams,*** 215 Tenn. 704, 389 S.W.2d 272 (Tenn. 1965). In ***Boyce,*** following the merger of a domestic insurance company with a foreign company, the insurance company's stockholders filed a petition for the common law writ of certiorari to vacate the Commissioner of Insurance's approval of the merger, that the merger be enjoined and the assets of the two corporations [*73] be segregated. The petition alleged that the commissioner was without authority to approve the merger. The trial court dismissed the petition upon finding that the commissioner had not exceeded his jurisdiction or acted

illegally. Upon review, the Tennessee Supreme Court addressed the question of whether an effectual relief could be granted well after the companies had merged and assets had been transferred, to wit:

> Should we now grant the relief sought and remand the case to the trial court for trial it would only amount to further delay.
>
> University has now been merged with a foreign corporation and we dare say most, if not all, its assets are in a foreign state and out of the jurisdiction of the courts of this state.
>
> Thus, the courts of this state cannot grant to appellants any effectual relief and to now remand the case for a trial would be a useless gesture on our part. The question of whether the commissioner's approval of the merger should be vacated or whether appellants are entitled to an injunction and a segregation of the assets of University as prayed for in the petition have become moot.
>
> * * *
>
> Where it appears the act to be enjoined has been consummated, [*74] an action for an injunction presents only a moot question and will be dismissed

Boyce, 215 Tenn. 704, 389 S.W.2d 272, 277-278 (citations omitted). The Appellants argue that ***Boyce*** is but "an anomaly - it should not be taken as an inspiration to intentionally repeat ancient mistakes." We disagree. ***Boyce v. Williams*** is well-settled precedent that the courts of Tennessee have relied upon in defining their scope of jurisdiction and is, in fact, directly analogous to the case at bar.

When the trial court denied the Appellants' petition for writ of certiorari and declared the case moot, the receivership and liquidation had been under way for eleven months, and all but four of Sentinel's defaulted bond issues had been transferred to successor trustees. As the trial court stated, Sentinel was in essence an empty shell. Furthermore, the failure to promptly have a post-seizure hearing challenging the factual basis for the seizure was entirely the fault of the petitioners. As stated in ***Boyce***:

> The rule is well established that review proceedings are not allowed for the purpose of setting abstract questions, but only to correct [*75] errors injuriously affecting the rights of some party to the litigation. Accordingly, an appeal or error proceeding will be dismissed if the question presented by it . . . has become moot or academic or if, . . . an event has occurred which makes a determination of it unnecessary or renders it impossible for an appellate court to grant effectual relief.

Boyce, 215 Tenn. 704, 389 S.W.2d 272, 278 (citations omitted). By the time the factual hearing occurred in late March, 2005, the ongoing liquidation of Sentinel and transfer of Sentinel's assets made it impossible for the court to grant effectual relief. Consequently, we find that the Davidson County Chancery Court did not err in denying the petition for a writ of certiorari and in declaring the case moot.

Accordingly, and for the foregoing reasons, the final orders of the respective trial courts are affirmed. Costs of these appeals are assessed to the Appellants, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Gary L. O'Brien, and their respective sureties.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.

APPENDIX B
TRIAL COURT OPINION
DENYING *SUPERSEDEAS*

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE PART I

SENTINEL TRUST COMPANY, and its Directors, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Bradley S. Lancaster, and Gary L. O'Brien,	)	
Petitioners	)	**No. 04-1934-I**
v.	)	
KEVIN P. LAVENDER, Commissioner Tennessee Department of Financial Institutions,	)	
Respondent	)	

MEMORANDUM and ORDER

This case is before the Court on motion requesting the Court issue a writ of supersedeas. This case involves a

challenge to the seizure of a financial institution by the Commissioner of the Tennessee Department of Financial Institutions. The petitioner is a state- chartered trust company. The Commissioner, having already seized the company and placed the business into receivership, is now moving to liquidate the business. The Commissioner filed his notice of liquidation on June 18, 2004. The receivership is pending in the Lewis County Chancery Court, and the notice of liquidation was filed in that court, The petitioner filed a petition for writ of certiorari in this Court pursuant to T.C.A. § 45-2-1502 (c) (1). That statute states:

> (c) (1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.[1]

In turn, the appropriate provision of title 27, chapter 9 states:

> **§ 27-9-106. Supersedeas** . (a) If the order or judgment rendered by such board or commission made the basis of the petition for certiorari shall make any material change in the status of any matter determined therein, the petitioner may, upon reasonable notice to the board or commission and other material defendants, apply to the chancellor, at

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[1] These statutes (T.CA. § 27-9-101 **et seq**.) are titled "Review of Boards and Commissions." See also T.C.A, § 45-1-108(a).

> the time of filing such petition, for a supersedeas, and the chancellor, in the chancellor's discretion, may grant a writ of supersedeas to stay the putting into effect of such order or judgment or any part thereof.
> (b) No such supersedeas shall be granted until a good and sufficient bond, in an amount to be fixed and approved by the chancellor, shall have been given by the petitioner, conditioned to indemnify the defendants named in the petition from any injury that may result by reason of the granting of such supersedeas.

The petition was filed on June 29, 2004, On July 16, 2004, the petitioner filed a motion for expedited hearing on the petition for supersedeas. Because of a scheduling problem, the Chancellor of Part I referred this motion to the undersigned to sit by interchange, and by Order entered August 2, 2004, the court set the motion for writ of supersedeas for a hearing on August 5, 2004. The hearing was held as scheduled.

The petitioners explained at the hearing that the Commissioner has no authority under the banking laws to seize a trust company and that this Court should therefore issue the writ of supersedeas and return control of the company to its Board of Directors. The request for supersedeas was made solely based on a statutory and constitutional argument that the seizure and liquidation was beyond the legal power of the Commissioner.[2]

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[2] Prior to the August 5, 2005 hearing, the Court met with counsel and offered to consolidate the hearings on the

The record in this case indicates that since 2000 the Commissioner has been concerned about the financial well being of Sentinel Trust Company, and in April 2004, the Department was of the opinion that the company had a net cash shortage in excess of $5,000,000.00. This concern led to several meetings between the Commissioner and executives and lawyers from Sentinel. On May 3, 2004, the Commissioner issued an order requiring Sentinel to make a substantial cash infusion by May 17, 2004 to replenish the cash deficiency and to submit to the Commissioner a capital plan.

When the petitioners did not respond to the satisfaction of the Commissioner, events were set in motion as follows:

1. On May 3, 2004, the Commissioner issued a cease and desist order pursuant to T,C.A. § 47-1-107(a) (5), requiring certain financial actions by Sentinel. The petitioners subsequently filed an administrative appeal of the cease and desist order. Events have long since passed that stage, however, and the administrative appeal may now be moot.

2. On May 18, 2004, the Commissioner took

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request for supersedeas with the review by certiorari and schedule it within 7-10 days so, that all issues before the Court could be resolved. The respondents lawyer indicated that she thought the Commissioner would agree to stop the liquidation until a final hearing, but counsel for petitioners stated that he wished to proceed on his immediate request for the writ of supersedeas as he was convinced that the Commissioner was acting beyond his statutory authority.

emergency possession of Sentinel pursuant to T.C.A. § 45-2-1502(b) (1) and (c) (1). The receivership was filed in the Lewis County Chancery Court as case number 4781. The record reflects that the parties believe that only this Court has jurisdiction over this challenge to the liquidation. This Court is not so sure.

It makes little sense for the receivership to be in Lewis County and yet the challenge to the seizure and liquidation go to another, The statutes do not seem to mandate such severance of issues. It appears to this Court that the entire statutory scheme contemplates that issue related to the receivership; seizure, and termination all be in the same court not two (2) courts. In fact, in order for the liquidation to go forward, it must be approved by the Levis County Chancery Court. See T.C.A. § 45-2-1502 (c) (2). The only mention of Davidson County Chancery Court is the authorization of the Commissioner to seek an injunction to enforce the law under T.C.A. § 45-1-107(a) (5) only in Davidson County. Review under Title 27, Chapter 9 pursuant to T.C.A. § 45-1-108 is not confined to Davidson County Chancery but can be filed in any chancery or circuit court. See T.C.A. §§ 27-9-102 and 103.[3]

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[3] The Court is aware of the holding in Tennessee Real Estate Commission v. Potts, 428 S.W2d 794 (Tenn. 1968) that normally the review of an administrative decision of a Board or Commissioner should be filed in Davidson County. The Court doubts the efficacy of that decision when the Commissioner has already invoked the jurisdiction of the local Chancery Court on the same subject matter as the

3. On May 18, 2004, the Commissioner appointed Receivership Management, Inc. to act as receiver. See T.C.A. § 45-2-1502(b) (2).

4. In June 2004, Department personnel issued a report stating that Sentinel had a deficiency in excess of $7,500,000.00 and that Sentinel was operating at a loss and only had corporate assets of around $1,400,000.00, The report concluded that Sentinel was insolvent.

5. On June 18, 2004, in light of the above and pursuant to T.C.A. §§ 45-2-1502 (c) (2) and 1504, the Commissioner issued a Notice of Liquidation of Sentinel Trust Company. As already noted, the notice was filed in the Chancery Court for Lewis County. That notice recites the factual contentions of the Commissioner and concludes:

> Accordingly, the Commissioner has determined that liquidation of Sentinel Trust Company in accordance with the provisions of Tenn. Code. Ann. §S 45-2-1502(c) (2) and 1504 is necessary and appropriate.
>
> Any person aggrieved or directly affected by the Commissioner's determination to liquidate Sentinel Trust Company may have judicial review in Davidson County Chancery Court by common-law writ of certiorari, as provided in Title 27, Chapter 9 of Tennessee Code Annotated, pursuant to Tenn. Code Ann. § 45-1-108(a).

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certiorari proceeding.

6. The petitioners on June 29, 2004 filed a complaint titled "Petition for Writ of Certiorari and for subsequent Writ of Supersedeas"

7. On July 16, 2004, the petitioners filed a. "Motion For Expedited Hearing on Petition For Supersedeas" requesting a hearing be set and that a writ of supersedeas be issued after the hearing.

The motion by petitioners seeks the writ of supersedeas because "Sentinel Trust Company is not a bank, and has none of the characteristic attributes of a bank" and that the statutory powers the Commissioner exercised only apply to a bank and therefore the Commissioner has acted "illegally' and "wholly outside his administrative and policing authority." The motion further states that "unless the writ of supersedeas shall be issued promptly to nullify the respondent Commissioner's past illegal acts, he soon wil~. have succeeded in destroying Sentinel Trust Company." The petitioner recites "the urgency of need for nullification of the Commissioner's arbitrary and illegal orders by supersedeas, so that its business may again be operated by its knowledgeable staff pending final determination,"

The lawyer for the petitioners has chosen the battleground. He has chosen to not yet enter the factual fray but has chosen the law as his weapon. He insists that the Commissioner has exceeded his statutory authority. He states emphatically that the statutes used by the Commissioner do not apply to trust companies but only apply to banks. The petitioners are wrong.

Whatever ambiguity there might have been prior to

1999 in the application of the banking laws to trust companies, it was eliminated in 1999. In 1999, the General Assembly amended the Act to specifically make trust companies subject to all of its provisions, not just those pertaining to fiduciaries. Section 3 of Chapter 112 of the Public Acts of 1999 amended T.C.A. § 45-1-124(b) by deleting that subsection and substituting the following:

> (b) To the full extent consistent with such rights, liabilities and. penalties, all state banks and, to the extent applicable, all banks. shall hereafter be operated in accordance with the provisions of this chapter and Chapter 2 of this title. Unless the Commissioner determines otherwise, the provisions of Title 45, Chapters 1 and 2 and the rules thereof shall apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes arid powers.

Section 4 of Chapter 112 further amended Tenn. Code. Ann. § 45-1-124 to add the following new subsection:

> ( ) The charter of a trust company granted by the commissioner shall not be void due to enactment of any amendment or repeal of the laws under which it was formed if such trust company is in operation, as determined by the commissioner, on July 1, 1999.
>
> ( ) Companies engaged in activities subject to Title 45, Chapters 1 and 2, on July 1, 1999, but formed, as determined by the commissioner, prior to the enactment of Chapter 620 of the Public Acts of 1980

and not previously subject to regulation by the commissioner may continue to act as a fiduciary without submitting an application. However, such entitles shall otherwise be fully subject to Chapters 1 and 2.

( ) Companies authorized by their charter, prior to the enactment of chapter 620, to engage in fiduciary activities, but not engaging in fiduciary activities on July 1, 1999, then must file the appropriate application to establish a trust company and then fully comply with Chapter 1 and 2.

( ) All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of Chapter 1 and 2 and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999. During this period of time, to conform to the requirements of Chapter 1 and 2, the commissioner may conduct examinations at such company's expenses, and apply the requirements of Chapters 1 and 2 as deemed appropriate.

These provisions of Chapter 112 make it clear the General Assembly's intent that all of Chapters 1 and 2 of Title 45 shall apply to the operation and regulation of state trust companies and that such companies shall fully comply and conform with all the provisions of these chapters, not just the

provisions pertaining to fiduciary activities.[4]

The Commissioner took possession of Sentinel pursuant to the provisions of Tenn, Code Ann. § 45-2-1502, which provides in part as follows:

> (a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:
>
> (1) Its capital is impaired or it is otherwise in an unsound condition;
>
> (2) Its business is being conducted in an unlawful or unsound manner;
>
> (3) It is unable to continue normal operations; or
>
> (4) Its examination has been obstructed or impeded
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> * * *
>
> (c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing, Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.

Petitioners make the novel argument that because this statute speaks only in terms of a state bank and

---

[4] The definition section of the Tennessee Banking Act contains the definitions of "state trust company" and "trust company" at T.C,A. § 45-1-103 (27) and (31).

its depositors and because Sentinel is neither a state bank nor has any deposits/depositors, this statute does not apply to Sentinel and, therefore, the Commissioner acted illegally or exceeded his authority when he took possession of Sentinel pursuant to this statute. This argument is directly contrary, however, to the clearly expressed intent of the General Assembly as set forth in Chapter 112. As discussed, supra, that act specifically states that "the provisions of Title 45, Chapters 1 and 2 and the rules thereof shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers," Tenn. Code Ann. § 45-2-1502 clearly is a provision contained within chapter 2 of Title 45 and, therefore, applies to the operation and regulation of Sentinel Trust Company. As such, the Commissioner acted with express statutory authority in taking possession of Sentinel pursuant to Tenn. Code Ann. § 45-2-1502.

The petitioners also make a secondary argument: that the acts of the Commissioner are unconstitutional. The Court disagrees. Intrusive statutory schemes governing financial institutions have been upheld against constitutional attack. Financial institutions traditionally have been very highly regulated by the government for obvious reasons. If the statutory scheme provides for emergency seizure and/or liquidation, the statute must provide for an immediate post-seizure hearing. The availability of such a hearing is set forth at

Tenn. Code Ann, § 45-2-1502 © (1) There is nothing in this record to indicate that the Chancery Court of Lewis County in the receivership action is not prepared to review all of the Commissioner's actions from the receivership to the seizure to the liquidation. These statutes granting the Commissioner the powers set forth are constitutional. See, e.g., Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552 (1947); Anonymous Batik v. Florida Dept. of Banking, 512 So.2d 1112 (Fla. Dist. Ct. App. 1987). There is nothing contained in the Constitution of Tennessee or Tennessee case law inconsistent with the above conclusion.

In Fahey the court reversed a federal district court that had declared Unconstitutional the seizure of a federal savings and loan association, the court emphasized that the statutes were not "penal" but "regulatory".

They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise, The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. flanking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and

many precedents have crystallized into well-known and generally acceptable standards.

Fahey. 332 U.S. at 252,

> It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint but in the light of the history and customs of banking we cannot say it is unconstitutional.

Fahey, 332 U.S. at 253-54.

For the reasons expressed, the Court concludes that the Tennessee banking laws contained in Chapters 1 and 2 of Title 45 fully apply to trust companies and that these statutes are constitutional. The factual foundation supporting the emergency seizure and subsequent decision to liquidate was not presented to the Court, and the Court expresses no opinion on that issue.

The Court is not convinced that it is the appropriate court to resolve this dispute. The receivership was filed in the Lewis County Chancery Court (and that court is proceeding with the receivership), and the notice of liquidation was tiled in that court. Before any further proceeding are held in this Court, the parties shall need to address whether this Court has jurisdiction and/or is otherwise the appropriate court to continue this action.

The motion for writ of supersedeas is denied.

This the
day of , 2004

_____

WALTER C. KURTZ, JUDGE

BY INTERCHANGE

cc via fax and mail:

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APPENDIX C
TENNESSEE COURT OF APPEALS ORDER DENYING INTERLOCUTORY APPEAL

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

SENTINEL TRUST COMPANY. ET AL. v. KEVIN P. LAVENDER

Chancery Court for Davidson County
No. 04-1934-I

No. M2004-02068-COA-R1 0-CV

FILED
Sep 01 2004
Clerk of the Courts

ORDER

This application for an interlocutory appeal pursuant to Tenn R. App. P. 9 and for an extraordinary appeal pursuant to Tenn. R. App. P. 10 involves a challenge to the seizure of a trust company by the Commissioner of the Tennessee Department of Financial Institutions. On May 18, 2004, the Commissioner took emergency possession of Sentinel Trust Company pursuant to Tenn. Code Ann. § 45-2-1502(b) (1) and (c)(l). The Commissioner filed a receivership action in the Chancery Court for Lewis County and is proceeding to liquidate the company.

On June 29, 2004, Sentinel Trust Company and its directors ("Sentinel") filed a "Petition for Writ of Certiorari and for subsequent Writ of Supersedeas" in the Chancery Court for Davidson County pursuant to Tenn. Code Ann. § 27-8-101 et seq asserting that the Commissioner has no authority to seize a trust company. The Chancery Court for Davidson County issued the Writ of Certiorari on July 1, 2004. On August 9, 2004, the trial court determined that the banking laws contained in Chapters 1 and 2 of Title 45 shall apply to trust companies and that the statutes are constitutional. Accordingly, the trial court denied Sentinel's request for a Writ of Supersedeas. The trial court subsequently denied Sentinel's Motion for Rehearing and Modification, but granted Sentinel permission to appeal pursuant to Tenn. R. App. P. 9.

Having reviewed the application and supporting documents, we cannot conclude that an interlocutory appeal is necessary to prevent irreparable harm or to prevent needless, expensive and protracted litigation. Nor can we conclude that the trial court has so far departed from the acceptable and usual course of judicial proceedings as to require immediate review under Tenn. R. App. P. 10,

It is, therefore, ordered that the "Interlocutory Application for Permission to Appeal and Application for Extraordinary Appeal under Rules 9 and 10, T.R.A.P." be denied. Sentinel Trust Company and its directors, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Bradley S. Lancaster and Gary L. O'Brien, and their surety are taxed with the costs for which execution may issue.

PER CURIAM

APPENDIX D
TRIAL COURT DECISION ON *CERTIORARI* TRIAL

IN THE CHANCERY COURT FOR DAVIDSON COUNTY,
TENNESSEE
PART I

SENTINEL TRUST COMPANY,	)	
and its Directors, Danny N. Bates,	)	
Clifton T. Bates, Howard H.	)	
Cochran, Bradley S. Lancaster,	)	
and Gary L. O'Brien,	)	
	)	
Petitioners	)	**No. 04-1934-I**
	)	
v.	)	
	)	
KEVIN P. LAVENDER,	)	
Commissioner Tennessee	)	
Department of Financial Institutions,	)	
	)	
	)	
Respondent		

MEMORANDUM AND ORDER

This is a case involving a challenge to the actions of the Commissioner of the Tennessee Department of Financial Institutions in using his emergency powers to take possession, without prior hearing, of the petitioners financial institution

on May 18, 2004. The petitioners also challenge the subsequent decision to liquidate. The petitioners challenged the emergency seizure and subsequent liquidation by filing a petition for writ of certiorari on June 29, 2004.

The Commissioner acted to take possession and then to subsequently liquidate Sentinel because he contended that "Sentinel had used pooled fiduciary funds to provide operating capital for non-related defaulted bond issues, thereby creating a fiduciary cash shortfall that greatly exceeds Sentinel's current operating capital and that Sentinel has failed to reconcile fiduciary cash and corporate cash accounts in a timely and accurate fashion and to keep accurate books and records." For the reasons stated herein, the Court affirms the decisions of the Commissioner and dismisses the petition.

Sentinel Trust Company provides fiduciary services as trustee and/or fiscal agent, bond registrar, and paying agent for various types of corporate and municipal bonds. The president and C.E.O. of Sentinel is Mr. Danny Bates and Mr. Bates and his wife own 90-95% of the stock. Most of the Board members are related by blood or marriage to Mr. Bates. As a financial institution, Sentinel Trust Company operates under the regulatory control of the Department of Financial Institutions.

This Court held an initial hearing on August 5, 2004, and issued a twelve-page memorandum and order denying the petitioners' request for a writ of supersedeas. After subsequent proceedings, which will be explained below, the Court held a final hearing and heard proof and argument on March 29, April 1, and April 4, 2005. The Court then took the case under advisement to study the record and render a final decision.

This is a convoluted case. Just how convoluted will

become apparent in this opinion as the Court outlines the chronological development and procedural turns.

The Commissioner exercises regulatory authority over financial institutions, including Sentinel Trust Company. Like all governmental regulators of financial institutions, he is charged with insuring the stability of such institutions. He is empowered to issue cease and desist orders and, in some extreme cases, to take possession of a financial institution and to liquidate. In some cases, the Commissioner cannot act to take possession until after the responding institution is given a hearing, but in an emergency situation, the Commissioner can take possession without a prior hearing - subject to a subsequent hearing. The two (2) applicable provisions of the law are at T.C.A. §§ 45-2-1502 (a) and © (1) as follows:

> 45-2-1502. **Commissioner in possession** - (a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:
>
> (1) Its capital is impaired or it is otherwise in an unsound condition;
>
> (2) Its business is being conducted in an unlawful or unsound manner;
>
> (3) It is unable to continue normal operations; Or
>
> (4) Its examination has been obstructed or impeded.
>
> . . . .

(c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.[1]

It is the Commissioner's exercise of power under T.C.A. § 45-2-1502© (1) that is at issue in this case. Petitioners also challenge the decision to liquidate. See T.C.A. § 45-2-1502(b) (2), T.C.A. § 45-2-1502 © (2); T.C.A. § 45-2-1503(b) and T.C.A. §45-2-1504.

A digression into a constitutional law overview is warranted. Usually, before the government can deprive a person of property, there must be a hearing. Financial institutions have, however, traditionally been very highly regulated for obvious reasons, and federal and state regulators have been empowered to act without prior approval to take possession of troubled financial institutions in order to provide immediate protection to depositors. **See, e.g., Fahey v. Mallonee, 332 U.S. 245, 67 S. Ct. 1552 (1947); First Federal Savings Bank v. Ryan,** 927 F.2d 1345, 1357-58 (6th Cir 1991) ; **Anonymous Bank v. Florida Dept. of Banking**, 512 So.2d 1112 (Fla. App. 1987).

In **Fahey**, the court reversed a federal district court

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[1] T.C.A. § 45-1-103 (9) states that a deposit means a deposit of money, bonds, or other things of value, creating a debtor-creditor relationship.

that had declared unconstitutional the seizure of a federal savings and loan association. The court emphasized that the statutes were not "penal" but "regulatory."

> They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and more closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards.

Fahey, 332 U.S. at 252.

> It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is

unconstitutional.

Fahey, 332 U.S. at 253-54. See also **Hodel v. Virginia Surface Mining Reclamation Ass'n, Inc.**, 452 U.S. 264, 101 5. Ct. 2352, 2372 (1981).

Assuming that the asserted facts warrant immediate intervention by the regulatory agency before a hearing can be held, then the timing of the post-seizure hearing becomes an issue. The Florida case cited above states that the financial institution is entitled to an "immediate" hearing. **Anonymous Bank**, 512 So.2d at 1114. The Supreme Court, while authorizing government seizures or suspensions without hearings in emergency situations, has mandated that the post-seizure hearing be "prompt" and "proceed and be concluded without appreciable delay." **Barry v. Barchi**, 443 U.S. 55, 99 S. Ct. 2642, 2650 (1979)

One further comment on the constitutional overlay is warranted. As one commentator has stated:

It will always be easier for a court to uphold a post-deprivation hearing system if the individual whose property or liberty is being limited is given some pre-deprivation opportunity to respond to charges against him or to communicate with the authority who will be making the initial decision to terminate the property or liberty interest.

Rotunda and Nowak, **Treatise on Constitutional Law** § 17.9, p.177-78 (3rd ed. 1999). **See** also **Barry**, 99 S. Ct. at 2649-50. Here, the Tennessee legislature has been sensitive to the above due process concerns. As T.C.A. § 45-2-1502(c)(1) states, "any person aggrieved and directly affected by this

action [the seizure of the financial institution] may have areview by certiorari as provided in Title 27, Chapter 9." The parties assert, and the case of **Tennessee Real Estate Comm'n v.Potts**, 428 S.W.2d 794 (Tenn. 1968), holds, that the proceeding must be had in the Davidson County Chancery Court. See also **Hawkins v. Tennessee Dept. of Correction,** 127 S.W.3d 749, 757-58 (Tenn. Ct. App. 2002). The decision to liquidate is also reviewable by petition for writ of certiorari. See T.C.A. § 45-1-108(a).

Despite the petitioners' right to a "prompt" hearing the Court did not hear proof from the petitioners that Sentinel was solvent, on a decent financial foundation, and that the Commissioner had made a significant mistake in exercising his power and taking possession until over ten (10) months after the May 2004 seizure. To explain this delay, the Court must chronicle both pre-seizure and post-seizure events.

I. BACKGROUND

(1) The record in this case indicates that since 2000, the Commissioner has been concerned about the financial well-being of Sentinel Trust Company, and in April 2004, the Department was of the opinion that the company had a net cash shortage in excess of $5,000,000.00. This concern led to a number of meetings and correspondence between the Commissioner and executives and lawyers from Sentinel.

2. On May 3, 2004, the Commissioner issued a cease and desist order pursuant to T.C.A. §47-1-107(a) (5), requiring certain financial actions by Sentinel. The petitioners subsequently filed an administrative appeal of the cease and desist order. Events have long since passed that stage, however, and the administrative appeal is long since moot.

3. On May 18, 2004, the Commissioner took emergency possession of Sentinel pursuant to T.C.A. §~ 45-2-1502(b) (1) and (c) (1). The receivership was filed in the Lewis County Chancery Court as case number 4781.

On May 18, 2004, the Commissioner appointed Receivership Management, Inc. to act as receiver. **See** T.C.A. § 45-2-1502 (b) (2).

5. In June 2004, Department personnel issued a report stating that Sentinel had a deficiency in excess of $7,500,000.00 and that Sentinel was operating at a loss and had corporate assets of only around $1,400,000.00. The report concluded that Sentinel was insolvent. On June 18, 2004, in light of the above and pursuant to T.C.A. §~ 45-2-1502(c) (2) and 1504, the Commissioner issued a Notice of Liquidation of Sentinel Trust Company. The notice was filed in the Lewis County Chancery Court as part of the already filed receivership proceeding. That notice recites the factual contentions of the Commissioner and concludes:

> Accordingly, the Commissioner has determined that liquidation of Sentinel Trust Company in accordance with the provisions of Tenn. Code. Ann. §S 45-2-1502© (2) and 1504 is necessary and appropriate.
>
> Any person aggrieved or directly affected by the Commissioner's determination to liquidate Sentinel Trust Company may have judicial review in Davidson County Chancery Court by common-law writ of certiorari, as provided in Title 27, Chapter 9 of Tennessee Code Annotated, pursuant to Tenn. Code

Ann. § 45-1108 (a).

6. On June 29, 2004, the petitioners filed this complaint, titled "Petition for Writ of Certiorari and for subsequent Writ of Supersedeas."

7. On July 16, 2004, the petitioners filed a "Motion For Expedited Hearing on Petition For Supersedeas," requesting a hearing be set and that a writ of supersedeas be issued after the hearing. The motion by petitioners sought the writ of supersedeas because "Sentinel Trust Company is not a bank, and has none of the characteristic attributes of a bank" and because the statutory powers the Commissioner exercised apply only to a bank; the Commissioner therefore had acted "illegally" and "wholly outside his administrative and policing authority." The motion further stated that "unless the writ of supersedeas shall be issued promptly to nullify the respondent Commissioner's past illegal acts, he soon will have succeeded in destroying Sentinel Trust Company." The petitioners recited "the urgency of need for nullification of the Commissioner's arbitrary and illegal orders by supersedeas, so that its business may again be operated by its knowledgeable staff pending final determination." The request for supersedeas did not allege that there was no factual predicate for the seizure. It alleged only that the Commissioner had no statutory authority to do what he did.

8. Because of a scheduling problem, the Chancellor of Part I referred the July 16, 2004 motion to the undersigned to sit by interchange, and by order entered August 2, 2004, the Court set the motion for writ of supersedeas for a hearing on August 5, 2004.

9. Prior to the August 5, 2004 hearing, the Court met with counsel and offered to consolidate the hearings on the request for supersedeas with the review by certiorari and schedule it

within 7-10 days so that all issues before the Court could be resolved. The Commissioner's lawyer indicated that she thought the Commissioner would agree to stop the liquidation until a final hearing, but counsel for petitioners stated that he wished to proceed on his immediate request for writ of supersedeas as he was convinced that the Commissioner was acting beyond his statutory authority.

10. The hearing on August 5, 2004 went forward, but at the petitioners' request, solely on their argument that the Commissioner had no statutory authority over trust companies. As the Court said at the time, the petitioners refused to enter the "factual fray." The petitioners were so adamant as to their legal position that they refused to make any other argument other than the legal one.

11. On August 8, 2004, the Court issued a twelve-page memorandum and order holding that the Commissioner did have statutory authority over state trust companies.

12. The petitioners sought an interlocutory appeal, which was denied by the Court of Appeals on September 1, 2004.

13. The petitioners next turned to the federal courts. Here again, the petitioners asserted that the Commissioner had no statutory authority over trust companies. The federal court opinion contains a detailed chronology of the facts leading to the Commissioner's seizure of the trust company. It notes on several occasions that the petitioners failed to avail themselves of the opportunity to make factual challenge to the Commissioner's actions. The federal court dismissed petitioners' claim. **See Sentinel Trust v. Lavender,** 2004 U.S. Dist. LEXIS 27259 (M.D. Tenn. Dec. 13, 2004)

14. On March 4, 2005, the petitioners finally moved for a status conference regarding setting the case for a final hearing. The Court met with counsel on March 16, 2005, and, by order entered that date, set the case for hearing on March 29, 2005. Although review by certiorari is usually circumspect and limited to the record, in order to ensure that the hearing held by the Court fully complied with due process requirements for a post-seizure hearing, the Court allowed the petitioners to present witnesses. The Commissioner had obviously gathered information and made a record before he took action and that record was forwarded to the Court, although the Commissioner did not formally take evidence. If an initial factual determination in an administrative proceeding is made by a person who has both enforcement and fact-finding duties and who also compiles the facts, then due process requires that the persons whose rights are subject to the process be given a de novo hearing and the right to present his own evidence. See Rotunda and Nowak, **Treatise on Constitutional Law** §17.8, p.103 (3rd ed.1999). **See also Cyphers v. United Parcel**, 3 S.W.3d 698 (Ark. 1999) (violation of due process to refuse to issue a subpoena requested by a party in order to permit the party to cross examine the witness and possibly present material evidence that might impeach not only the testimony, but the findings made by the agency as well).

II. HEARING ON MARCH 30 AND APRIL 1

The hearing was conducted on the multi-volume record filed by the Commissioner as well as the four (4) witnesses presented by the petitioners and other marked exhibits. The witnesses were:

(1) David Lemke, a Nashville lawyer who previously represented Sentinel in its negotiations with the

Commissioner until shortly before the Commissioner took possession of Sentinel.

(2) Robert Whisenant, a CPA who offered testimony regarding the financial health of Sentinel at the time of the seizure.

(3) Beverly Horner, a CPA who participated in the last effort to audit Sentinel.

(4) Danny Bates, president and principal owner of Sentinel.

A

COMMISSIONER'S PROOF

The Commissioner's proof is contained in the voluminous record. The Court quotes the findings in the federal court opinion because it contains a good, accurate summary of the proof and position of the Commissioner.

On November 20, 1975, Sentinel was chartered under the Tennessee General Corporation Act to engage in general trust company business. By law, Sentinel was not subject to the provisions of the Tennessee Banking Act or to regulation by the Tennessee Commissioner of Financial Institutions at the time of its charter. Sentinel operated for more than twenty years at various offices in Nashville, Tennessee.

Effective July 1, 1999, the General Assembly amended the Tennessee Banking Act to extend application of the banking statutes to trust companies, including those, like Sentinel, that had been chartered before 1980. Tenn. Code Ann. § 45-1-124 (2000). Specifically, the legislature provided in the amended statute that, [u]nless the

commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers." Tenn. Code Ann. § 45-1-124 (b). The amendment further provided that the Commissioner could allow trust companies a period of up to three years from July 1, 1999, to establish full compliance with Chapters 1 and 2 of the Tennessee Banking Act and the regulations promulgated thereunder. Tenn. Code Ann, § 45-1-124(h). Also, the Commissioner was given authority to conduct examinations of any trust company at the company's expense and to apply the requirements of Chapter 1 and 2 to trust companies. Id.

After these amendments took effect, state examiners conducted an initial visitation at Sentinel on October 22, 1999. The examiners identified certain violations of the Tennessee Banking Act which they discussed with Sentinel's President, Danny Bates. Thereafter, state examiners conducted three full-scope examinations of Sentinel in the years 2000, 2001, and 2002. At each of these, state examiners identified particular shortcomings that were discussed with Sentinel's Officers and Directors. While Sentinel improved over time in certain areas of its operations that examiners had criticized, its performance declined in other areas, to the consternation of the state examiners. Of particular concern to the examiners were the number of bond issues held by Sentinel as fiduciary that were in overdraft status and Sentinel's commingling bond and corporate funds. It was during this period that Sentinel built a new building and moved all of its operations to Hohenwald, Lewis County, Tennessee.

The fourth full-scope examination commenced June 13,

2003. Additional concerns arose during the examination. By September 2003, the examiners notified the Assistant Commissioner of the Department of Financial Institutions that Sentinel was believed to have a significant fiduciary shortfall. As a result of their report, the examination was interrupted to allow completion of Sentinel's 2002 audit.

On October 6, 2003, the Defendant met personally with Sentinel's Board of Directors to discuss issues and concerns relating to the examination, During this meeting, President Bates admitted that Sentinel used commingled funds from various bond issues to pay the expenses on other non-related defaulted bond issues. At this meeting, the financial condition of the company was discussed. The Defendant reminded the Directors that Sentinel was in violation of state statute and department regulation in that its 2002 audit had not been conducted. Further, the Defendant expressed concern that one auditor Sentinel had hired to conduct the 2002 audit had resigned and Sentinel appeared to be taking an undue period of time to hire a replacement auditor.

Continuing efforts {were] made by Sentinel to obtain an audit and by the examiners to reconcile Sentinel's books through late 2003 and into 2004. The examiners were hampered by Sentinel's use of two different accounting systems which were not reconciled to each other or to bank statements. Ultimately, in light of several significant concerns, Sentinel's auditor would not express an opinion on the financial statement of Sentinel as of December 31, 2002.

In light of this, state examiners conducted further visitations at Sentinel in March and April 2004. Based upon [the] record Sentinel provided, examiners believed that a significant net fiduciary cash shortage existed that Sentinel could not explain.

In early April 2004, the Defendant sent Sentinel a letter requesting an attorney opinion justifying the legal basis for Sentinels practice of "borrowing" funds generated by one bond issue to pay the expanses of another. In mid-April Sentinel's bank letter of credit for insurance purposes expired. On April 20, 2004, Sentinel's attorneys refused to give the opinion letter the Defendant had requested.

Sentinel's Executive Vice President and two attorneys representing Sentinel then asked to meet with the Defendant and his staff on April 28, 2004. Sentinel requested permission to continue using funds from the commingled fiduciary cash account to meet immediate cash needs on bond issues. Sentinel also asked to transfer fiduciary positions on two bond issues to successor trustees. The Defendant denied both requests. However, Defendant stated he wanted to meet with the Board on Friday, April 30, 2004, and would be requesting an immediate capital injection.

On April 30, the Defendant and his staff met with Sentinel's full Board of Directors. During that meeting, President Bates admitted that Sentinel then had a fiduciary cash shortfall of $ 7.25 million. The Defendant responded that he would issue an Emergency Cease and Desist Order on Monday, May 3, 2004, requiring an infusion of $ 2 million in capital as a showing of the Board's good faith and commitment to operation of the company. The Defendant also indicated that he and his staff would work with Sentinel's Board of Directors to allow it to eliminate the cash deficit over time under an approved capital plan, if the Directors would make the required infusion of capital.

Late on the afternoon of May 3, 2004, Sentinel's management submitted a capital plan to the Defendant, but then immediately withdrew it on advice of counsel. That

evening, at 5:50 p.m., the Defendant issued an Emergency Cease and Desist Order, copies of which were hand-delivered to Sentinel's counsel and sent by overnight courier to Sentinel's Board of Directors.

The Emergency Cease and Desist Order included four charges stating that Sentinel was operating in an unsafe and unsound manner (1) by using pooled fiduciary funds to provide operating capital for non-related defaulted bond issues, which created a fiduciary cash shortfall that changed on a daily basis and greatly exceeded Sentinel's then-current operating capital, (2) by operating with an inadequate level of capital for the kind and quality of accounts held under administration, (3) by failing to reconcile fiduciary cash and corporate cash accounts in a timely and accurate fashion, and (4) by failing to keep accurate books and records. The Order directed Sentinel, its Directors, officers, employees, agents, successors and assigns to cease and desist from engaging in numerous delineated acts with regard to operations, and further ordered them, among other things, to make an initial capital infusion of $ 2 million in cash by the close of business on May 17, 2004, and to submit a capital plan to completely replenish the fiduciary pooled demand deposit account.

Sentinel then obtained new legal counsel after the attorneys who had been representing Sentinel withdrew from representation when President Bates refused to resign his position with Sentinel. The new attorneys, who have substantial experience in the operation of financial institutions, communicated with the Defendant and members of his staff numerous times in the following days in an attempt to avoid the necessity of placing Sentinel in receivership. On May 17, 2004, the Defendant and his staff met with Sentinel's counsel, who reported that Board members did not have sufficient funds to meet the required

capital infusion.

As a result, on May 18, 2004, effective at 10:00 a.m., the Defendant took emergency possession of Sentinel by posting at Sentinel and filing in Lewis County Chancery Court at Hchenwald, Tennessee, a Notice of Possession of Sentinel Trust Company, pursuant to Tenn. Code Ann. § 45-2-1502(b) (1) & (c) (1) . Among its provisions, the Defendant's Notice specifically stated:

> Any person aggrieved or directly affected by the Commissioner's emergency possession of Sentinel Trust Company may have judicial review in Davidson County Chancery Court by common-law writ of certiorari, as provided in Title 27, Chapter 9, of Tennessee Code Annotated.

The Defendant also entered an Order appointing Jeanne Barnes Bryant/Receivership Management, Inc., to serve as Receiver under Tenn. Code Ann. § 45-2-1502 (b) (2)

Sentinel again obtained new counsel. On June 2, 2004, Sentinel and its Board of Directors filed with Defendant their "Respondents' Special Appearance, Statement of Special Defenses, and Answer to Notice of Charges." Sentinel and its Directors emphatically contended that the Defendant lacked any power or jurisdiction under the Tennessee Banking Act to take emergency possession of Sentinel, a trust company. Without waiving this position, Sentinel responded directly to each charge the Defendant had made in the Notice of Possession and demanded "every hearing and other procedural safeguard" to which it was entitled.

The next day, June 3, 2004, having received Sentinel's demand for a hearing, the Defendant filed a request for an assignment of an Administrative Law Judge to hear the

contested case. On June 16, 2004, the assigned Administrative Law Judge contacted counsel for the parties by letter, in which he set forth pre-hearing procedures to be followed and then stated "When you are ready to set a hearing date, please call me so we can pick a mutually acceptable time." According to the record before the Court, Plaintiffs did not, at any time, ask the Administrative Law Judge to set a hearing date, and Plaintiffs did not state otherwise at the hearing before this Court.

On June 17, 2004, the Defendant, members of his staff, and legal counsel met with Plaintiff Bates and Sentinel's attorney and gave them the opportunity to review a draft report prepared by the state examiners and the Receiver concerning the insolvency of Sentinel. The Defendant permitted Plaintiff Bates and his attorney to take this draft report into a private room to review it for about one hour. The Defendant stated that he wanted the report to be accurate and asked Plaintiff Bates and his attorney to point out any inaccuracies or any other concerns they might have.

The draft report reflected that, as of December 31, 2003, Sentinel had a shortfall in the pooled fiduciary account of $ 5,789,011.00. The report also showed that the shortfall increased over the next four months so that, by May 18, 2004, the deficiency ranged from $ 7,612,218.00 in one accounting system used by Sentinel to $ 8,430,722.00 in the fiduciary account system. Further, the Receiver had discovered bond principal and interest checks totaling $ 861,107.11 in Sentinel's vault that had not been sent to bondholders. The report also showed, based on Sentinel's records, that for the first four and one-half months of 2004, it operated at a net loss of $ 197,917.00. Sentinel had total corporate assets of $ 1,389,683. Thus, considering the cash deficiency in the pooled fiduciary account, Sentinel was insolvent in an

amount of at least $ 6,225,445 as of May 18, 2004.

After reviewing the report, Sentinel's attorney pointed out a typographical error in the report and stated he would like to submit written comments the following morning. The attorney made other observations about matters concerning the Receiver's operations. A few changes were made to the report as the result of the meeting, and then the final report was provided to the Defendant. The next morning, June 18, 2004, Sentinel's attorney and Defendant's counsel had several conversations about the submission of Sentinel's written comments, but ultimately Sentinel did not submit any. It appears that Sentinel did not, at any time, inform the Defendant of any errors noted in the draft report.

Upon consideration of the final report, the Defendant decided that Sentinel should be liquidated. Early on the afternoon of June 18, 2004, Defendant filed a Notice of Liquidation in the Lewis County Chancery Court proceeding, pursuant to tenn. Code Ann. § 45-2-1502 (c) (2). The Notice stated the reasons why the Defendant had determined liquidation was necessary and indicated the Defendant would proceed to liquidate Sentinel pursuant to Tenn. Code Ann. § 45-2-1504. The Notice of Liquidation provided that " [a]ny person aggrieved or directly affected by the Commissioner's determination to liquidate Sentinel Trust Company may have judicial review in Davidson County Chancery Court by common-law writ of certiorari, as provided in Title 27, Chapter 9 of Tennessee Code Annotated, pursuant to Tenn. Code Ann. § 45-1-108 (a) ." Since June 18, the Defendant and the Receiver have proceeded to liquidate Sentinel, and they have made filings with the Lewis County Chancery Court seeking permission to take certain actions with regard to that liquidation.

Sentinel Trust, 2004 U.S. Dist. LEXIS 27259, at *6-18. The federal judge stated that the above facts were the "written factual record submitted by the parties." Id. at *6. The record in this case fully supports the facts stated above.

In addition to the above, the Commissioner emphasized part of his cease and desist order issued several weeks prior to the seizure:

In response to the April 5, 2004 letter, Sentinel's counsel requested a meeting with the Commissioner. On April 28, 2004 Sentinel's Executive Vice President Paul Williams and Sentinel's attorneys Alex Buchanan and David Lemke met with the Commissioner. At this meeting, counsel for Sentinel indicated that the practice of funding defaulted bond expenses with funds from other non-related bond issues was inappropriate. They indicated that the expenses attributable to defaulted bonds are typically funded with corporate assets.

At the April 28, 2004 meeting, counsel, on behalf of Sentinel, requested permission for Sentinel to continue on a temporary basis the practice of "borrowing" funds from one bond issue to cover the expenses of unrelated defaulted bond issues. The Commissioner declined to approve the request.

Counsel for Sentinel also stated at the April 28, 2004 meeting that Sentinel's fiduciary cash shortfall is believed to be between $8-10 million.

On April 30, 2004 the five members of Sentinel's Board and their counsel met with the Commissioner. At that meeting President Danny Bates stated that Sentinel's most recent calculations show that Sentinel had a deficit fiduciary cash position of seven million two hundred fifty thousand dollars ($7,250,000). However, Mr. Bates indicted that this figure fluctuates daily. Finally, Mr. Bates stated that

Sentinel's corporate cash account had a current balance of fifty three thousand dollars ($53,000). The Department believes that the amount of cash is inadequate to pay the operating capital needed for the administration of the defaulted bonds for the immediate future.

These events were then followed by a letter from Sentinel's own lawyer to the Board of Directors on May 6, 2004, as follows:

As counsel to Sentinel Trust Company, we feel we need to address an issue with you as Board members. Please keep in mind that our advise is intended as what we believe to be the best interests of the Company, which may not be in the best interest of the Board members. In that regard, it is our conclusion that it would be in the best interest of the Company for the current Board members, other than Danny, to ask Danny to resign as an officer and director of the Company. If he does not do so voluntarily, we will have to resign as counsel to the Company and we recommend that the remaining Board members consult independent counsel as to the course of their own actions.

We do not make this recommendation lightly, but we do so having due regard for the circumstances that Sentinel finds itself and in bight of the implications of the Cease and Desist Order. Assuming Danny resigns, the remaining Board should immediately appoint an independent person(s) to take the lead on handling Sentinel's affairs until further action is taken by the State. If this plan is one that the Board is willing to implement, please keep in mind that the Cease and Desist Order requires the Commissioner's approval before there is change in management. Therefore, it would be imperative to identify the person(s) that Sentinel proposed to handle Sentinel's affairs upon Danny's resignation and to receive the

Commissioner's prior consent to that management change. Please let me know if this is a plan that the Board is willing to adopt. We ask for a reply by the close of business on May 10, 2004.

The Board did not act on this recommendation nor was there an infusion of cash. Mr. Lemke resigned only to be replaced by lawyers from Miller & Martin. Those lawyers were no more successful in having their client, Sentinel, follow their recommendations. **See** Exhibit 28, letter from Mary Neil Price to The Department. When the seizure took place, the Miller & Martin lawyers also withdrew.

B. PETITIONERS' PROOF

The petitioners' first called David Lemke as a witness. Mr. Lemke is an attorney for the Waller Lansden law firm, which the petitioners describe in their petition as "a firm of highprofessional reputation, standing and abilities." Petition ¶ 27[2]

Mr. Lemke testified that he had represented Sentinel for a number of years but in matters unrelated to its relationship with the Commissioner. He was not consulted by Mr. Bates on the regulatory matters until April 2004. At the request of Mr. Bates, he booked into Sentinel's use of the pooled trust funds and concluded that Sentinel's use of these funds was

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[2] However, in their administrative complaint, the petitioners state that Waller Lansden lawyers were "neither qualified nor competent to express opinions on accounting matters." (Record 00575).

inconsistent with industry standards and that he could not render an opinion that it was legal given his understanding of the custom in the industry. Mr. Lemke also noted that in April 2004, he became aware of the 6-8 million-dollar shortfall in accounts regarding defaulted bond issues. When he made inquiries of Mr. Bates about the shortfall he got an explanation that made "no sense." He then recommended that Mr. Bates resign because Sentinel needed an "honest broker" and that Mr. Bates had "issues." Mr. Lemke said he could get no rational explanation from Mr. Bates about the shortfall. He further stated that he thought that Sentinel was under-capitalized on the corporate side. Sometime in early May 2004, he ceased to represent Sentinel.

The Court is not certain why Mr. Lemke was called by the petitioners as his testimony appeared to corroborate the Commissioner's proof and was not helpful to the petitioners.

The petitioners second witness was an accountant, Mr. Robert Whisenant. Mr. Whisenant stated that Sentinel was not insolvent when the Commissioner took it over in May 2004. By the three (3) most important measures, Sentinel was viable. It continued to make its bond payments. It continued to pursue defaulters. It was making collections. He described Sentinel as a "moving target" because in this kind of business everything is "timing." It is common to rely on future income, go through cycles, and have trouble with cash flow. Given the above, he thought there was no way it could be considered insolvent.

As to the pooled trust account, Mr. Whisenant could not say whether Sentinel's use of it was appropriate. He admitted it that was beyond his expertise, but as far as he knew, it was proper. He also thought that Sentinel's accounting consideration of the fees and monies used from this account for

collection against defaulted issues was appropriate and was an asset.

The third witness was accountant Beverly Homer. Ms. Homer worked on the 2003 audit of Sentinel for Kraft, Inc. The audit was never completed as Kraft could never verify the account receivables and there were continuing problems about commingling the trust and corporate accounts. See Exhibits 9 and 10. Just like Mr. Lemke, this witness seemed to help the respondent more than the petitioners.

The fourth witness was Mr. Danny Bates. Mr. Bates purchased Sentinel beginning in 1986. He related how recent cash flow problems were the result of the so-called Namer bond issue failures as well as recent problems in the health care industry. He felt that by late 2003, he had successfully worked out most all of the defaulted bond issues and that he had bonds in the books that would have continued to generate fees for years to come.[3] He responded to criticism that he had failed to report a sizeable Chancery Court judgment by saying that the judgment was reported and that the judgment was resolved by a settlement that Mr. Bates personally paid by making a gift to Sentinel.

Mr. Bates insisted that the Commissioner's concerns of the cash shortfall were based on the Department's misunderstanding of the collected practices of his business and its accounting methods. He stated that there was no reason that given the cash flow of the business, the problems could not be worked out and that he was prepared to follow

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[2] The record reflects that one point, that the company was administering 143 bond issues, 26 of which were in default or in a "workout situation."

all the recommendations of the Commissioner except for the suggestion of the infusion of $2,000,000.00 in cash.

On the one hand, he testified that Sentinel's use of the pooled trust account to fund collection of defaulted bond issues was proper, but on cross examination, he admitted that the bond indenture agreement "probably" prohibits the use of bond payments being used to collect for other bond issues. Further, he testified that he was little concerned by the failure of his accountants to complete audits in 2002 and 2003. The confusion over the receivables by his hired auditors seemed to be of small import. As already noted, he insisted that the concerns of the Department over the co-mingling of funds with reference to the pooled trust account and the so-called shortfall was based on a misunderstanding regarding the intricacies of the trust business, the administration of the bond issues, bond defaults, and fee collection. Mr. Bates agreed with Mr. Whisenant that Sentinel was not insolvent and that it continued to make its bond payments, make collections, and pursue defaulters.

Perhaps a good summary of Mr. Bates' position as to the accounting problems is found in the petitioners' administrative complaint:

Respondent Company Sentinel admits that its Board met with the Commissioner and others on April 30, that its President Bates answered that the sum of cash overdrafts in defaulted trust accounts and prior overdrafts then being carried as a receivable on the Trust Department books and records was an estimated approximately $7.25 million. Said Respondent further alleges that the fees and expenses cumulatively paid to its Counsel equaled more than half of the overdrafts and receivables incurred in its performance of its duties to the bondholders of defaulted bonds: that its

method of accounting and funding fees and expenses for defaulted trust accounts had not changed from the time the Department first began its examinations in 1999 and that until the present time the Department had not instructed or advised Sentinel that its policies and procedures were not acceptable. Said Respondent further alleges that the Department knew or should have known about these matters since Sentinel obeyed the Department's requirements that it file monthly reports with the Department from November, 2000 to July, 2001, and that it thereafter filed quarterly reports continuing through and up to April 30, 2004.

Record 00575-76.

III. FINDINGS

1. This Court was always open and ready to grant the petitioners a prompt post-seizure and/or post-liquidation notice hearing. The failure to have a prompt post-seizure hearing challenging the factual basis for the seizure was entirely the fault of the petitioners. Petitioners' counsel in August, 2004 insisted that his legal arguments were so strong that he did not need a hearing on the facts. He insisted on a hearing limited to his argument that the banking statutes did not apply to trust companies. **See** Memorandum and Order of August 9, 2004. This insistence was pressed in the face of the Court's offer to give him a final hearing on all issues within 7-10 days of August 5, 2004. When petitioners lost their legal argument in state court, they were so sure of their position that they then went to federal court where they again lost. Finally, having failed to win on their legal argument, petitioners finally in March 2005, ten (10) months after the Commissioner took possession, requested a hearing challenging the Commissioner's factual determinations.

2. The Court continues to adhere to its decision expressed in its memorandum and order of August 9, 2004 that the banking statutes apply to trust companies and that the statutory structure allowing the Commissioner to take possession pursuant to T.C.A. § 45-2-1502(c)(1) and related statutes is constitutional. The memorandum and order of August 9, 2004 is incorporated herein.

3. The factual challenge to the Commissioner's action has been delayed so long by the petitioners that this case is now moot. **See Boyce v. Williams**, 389 S.W.2d 272, 277-78 (Tenn. 1965) . The receivership and liquidation have proceeded now for eleven (11) months, and the record indicates that Sentinel is but an empty shell. While Humpty Dumpty could perhaps have been put back together in the Summer of 2004 it can no longer be put back together. As the Court stated in Boyce in considering an analogous situation:

> Should we now grant the relief sought, and remand the case to the trial court for trial it would only amount in further delay.
>
> University has now been merged with a foreign corporation and we dare say most, if not all, its assets are in a foreign state and out of the jurisdiction of the courts of this state.
>
> Thus, the courts of this state cannot grant to appellants any effectual relief and to now remand the case for a trial would be a useless gesture on our part. The question of whether the commissioner's approval of the merger should be vacated and whether appellants are entitled to an injunction and a segregation of the assets of University as prayed for in the petition have become moot.

. . . .

> Where it appears the act to be enjoined has been consummated, an action for an injunction presents only a moot question and will be dismissed. The judgment of the trial court dismissing the petition for a writ of certiorari and supersedeas is affirmed.

Boyce, 389 S.W.2d at 277-78.

4. If the Court were to reach the factual merits, the Court would affirm the actions of the Commissioner. There is an argument that Sentinel's condition fell short of an "emergency" as it was still operating, although its capital was "impaired" and it was being conducted in an "unsound manner" and therefore, the Commissioner could have used T.C.A. § 45-2-1502 (a) (possession after hearing) rather than (c) (1) (possession without a prior hearing) . The Court also is aware that the petitioners and their lawyer are convinced that the Commissioner has acted wrongfully in taking possession arid then moving to liquidate. One former employee even termed the Commissioner's actions to be "malicious and vindictive." (Record at 00495)

The Court is of the opinion, however, that when administrators deal with financial institutions there is little ground for half measures. The Board had failed to act on the Lemke recommendations nor had the cease and desist order produced results. Furthermore, given the June 2004 report of the receiver and the failure of Mr. Bates and the Board to respond to the report, the decision to liquidate is supported by the record. In resolving the significant differences between the Bates/Whisenant view of Sentinel's economic viability and the Commissioner and his auditors, the Court places special emphasis on three (3) points:

a. The lawyers. The lawyers for Sentinel in April and May 2004 were experienced commercial lawyers with

knowledge of trust companies' obligation to its bond holders and its financial operations. None of the lawyers expressed any doubt as to the Commissioner's understanding of Sentinel's condition in relation to the shortfall or the use of the pooled trust account. None of the lawyers took the position that the Commissioner was acting arbitrarily or without good reason. Indeed, Mr. Lemke testified that he found Mr. Bates unable to rationally explain most of the shortfall, and he expressed great concern about Sentinel's use of the pooled trust funds for an unauthorized purpose. The opinions and actions of the Waller Lansden and then the Miller & Martin lawyers is consistent with the Commissioner's view of the financial condition of Sentinel and inconsistent with the Bates/Whisenant view.[4]

b. The record shows that up until several months after the Commissioner took possession, Mr. Bates did not take issue with the Commissioner's recommendations or opinion as to the financial health of Sentinel. Mr. Bates actually appears to agree, at least implicitly, with the Commissioner's assessment up through and including the receiver's first report in June 2004. There is nothing in the record to indicate that Mr. Bates or his lawyers ever told the Commissioner in writing or orally that he did not understand the trust business, the way it operated, its accounting standards, or that the Commissioner was mistaken and about to make a terrible mistake.

c. The Court finds the McCullough affidavit

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[4] Specific comments by the Miller & Martin lawyer are at 00454-55 of the record and in several correspondence found in the record.

especially enlightening. The facts set out therein are creditable and consistently supported by the entire record. (Exhibit 31 - 8 pages).

All this leads the Court to conclude that the facts support the conclusion of the Commissioner that an emergency existed and that the money in the pooled trust account belonging to the bond holders was in immediate threat if he did not act. The record further supports his decision to liquidate.

IV. CONCLUSION

For the reasons expressed above, the petition for a writ of certiorari is denied. This case is dismissed, and the costs are taxed to the petitioners. This is a final order disposing of all issues before the Court.

This the _____ day of _____, 2005.

_____

WALTER C. KURTZ, JUDGE
BY INTERCHANGE

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APPENDIX E
TENNESSEE SUPREME COURT DENIAL OF APPLICATION FOR PERMISSION TO APPEAL

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
JUL - 3 2006
Clerk of the Courts

**SENTINEL TRUST COMPANY, ET AL. V.
KEVIN P. LAVENDER,
COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF FINANCIAL INSTITUTIONS**

No. M-2005-01073-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of Sentinel Trust Company, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien and the record before us, the application is denied.

PER CURIAM

APPENDIX F
CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

T.C.A. § 35-3-117(j).

35-3-117. Investment in securities of management investment company or investment trust by bank or trust company -- Fiduciary liability -- Abuse of fiduciary discretion

* * *

(j) If a court determines that a fiduciary has abused its discretion regarding the allocation and nature of investments of trust assets, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require a distribution from the trust to the beneficiary in an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position, taking into account all prior distributions to the beneficiary.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the

trust, or both, in whole or in part, to their appropriate positions, taking into account all prior distributions, by requiring the fiduciary to withhold an amount from one (1) or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (j)(1) and (j)(2), to restore the beneficiaries, the trust, or both, to the position they would have occupied if the fiduciary had not abused its discretion, the court may require the fiduciary to pay an appropriate amount from its own funds to one (1) or more of the beneficiaries or the trust or both.

T.C.A. § 45-1-103(3)—Excerpts

45-1-103. General definitions

As used in chapters 1 and 2 of this title, unless the context otherwise requires:

(1) "Act as a fiduciary" or "acting as a fiduciary" means to act in the capacity of a fiduciary as defined in § 35-2-102;

(2) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined;

(3) "Bank" means any person, as hereinafter defined, doing a banking business subject to the laws of this or any other

jurisdiction and, for the purposes of supervision, examination and liquidation, includes industrial investment companies and industrial banks authorized by chapter 5 of this title;

(4) "Branch" with respect to a state bank means any place of business separated from the main office of a bank at which deposits are received, or checks paid or money lent;

(5) "Commissioner" means the commissioner of financial institutions;

* * *

(7) "Company" includes a bank, trust company, corporation, partnership, association, business or other trust, or similar business entity;

(8) "Department" means the department of financial institutions;

(9) "Deposit" means a deposit of money, bonds or other things of value, creating a debtor-creditor relationship;

(10) "Depository institution" means any company included for any purpose within any of the definitions of "insured depository institution" as set forth in *12 U.S.C. § § 1813*(c)(2) and (3);

(11) "Executive officer," when referring to a bank, means any officer designated as such in the bylaws and includes, whether or not so designated, the president, any vice president, the treasurer, the cashier, the comptroller and the secretary, or any officer who performs the duties appropriate to those officers;

* * *

(18) "New trust office" means a trust office located in a host state which:

(A) Is originally established by the trust institution as a trust office; and

(B) Does not become a trust office of the trust institution as a result of:

(i) The acquisition of another trust institution or trust office of another trust institution; or

(ii) A merger, consolidation, or conversion involving any such trust institution or trust office;

(19) "Office" with respect to a trust institution means the principal office or a trust office, but not a branch;

(20) "Officer," when referring to a bank, means any person designated as such in the bylaws and includes, whether or not so designated, any executive officer, the chair of the board of directors, the chair of the executive committee and any trust officer, assistant vice president, assistant treasurer, assistant cashier, assistant comptroller, assistant trust officer, or any person who performs the duties appropriate to those offices;

(21) "In operation" or "operating" means that:

(A) A charter has been issued to a bank by the United States comptroller of the currency or a certificate of authority has been issued by the commissioner; or

(B) A bank has all appropriate approvals to accept insured deposits from the public;

(22) "Person" means an individual, corporation, firm, trust, estate, partnership, joint venture, or association;

(23) "Principal office" with respect to a:

(A) State trust company means a location registered with the commissioner as the state trust company's home office

at which:

(i) The state trust company does business;

(ii) The state trust company keeps its corporate books; and

(iii) At least one (1) executive officer of the state trust company maintains an office; or

(B) Trust institution, other than a state trust company, means its principal place of business in the United States;

* * *

(26) "State bank" means any bank chartered by this state;

(27) "State trust company" means a corporation organized or reorganized under the Banking Act, as compiled in this chapter and chapter 2 of this title, whose purposes and powers are limited to fiduciary purposes and powers, including a trust company previously organized under the laws of this state;

(28) "State trust institution" means a trust institution having its principal office in this state;

(29) "Subsidiary corporation" means any corporation, all or part of the stock of which is owned by a bank principally for the purpose of participating in the active management of the business of such corporation as distinguished from the purpose of deriving profit from the appreciation in value of such stock or from dividends paid thereon;

(30) "Terms" when referring to loans means maturities, security for, rates of interest and other charges;

(31) "Trust company" means a state trust company or any other company chartered to act as a fiduciary that is neither a depository institution nor a foreign bank;

(32) "Trust institution" means a depository institution, foreign bank, state bank or trust company authorized to act as a fiduciary;

(33) "Trust office" means an office, other than the principal office, at which a trust institution is authorized by the commissioner to act as a fiduciary; and

(34) "Unauthorized trust activity" means:

(A) A company, other than one identified in chapter 2, part 10 of this title, acting as a fiduciary within this state,

(B) A trust institution acting as a fiduciary in this state at any location that is not its principal office, trust office or branch, or

(C) An out-of-state trust institution acting as a fiduciary in this state in violation of an order issued by the commissioner.

T.C.A. § 45-1-124.

45-1-124. Application of chapters 1 and 2 of this title

(a) The existence of state banks formed or existing on April 2, 1969, shall not be impaired by the enactment of this chapter and chapter 2 of this title, or by any change in the requirements for the formation of state banks, or by any amendment or repeal of the laws under which they were formed or created, and except as otherwise expressly provided in those chapters, the repeal of a prior act or acts by those chapters shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.

(b) To the full extent consistent with such rights, liabilities, and penalties, all state banks and, to the extent applicable, all banks, shall hereafter be operated in accordance with the provisions of this chapter and chapter 2 of this title. Unless the commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers.

(c) All powers granted in this chapter and chapter 2 of this title may be freely exercised by any corporation, which is empowered by its charter under any prior act of the general assembly and any amendments thereto, to exercise the rights and powers which appertain and belong to a banking institution or to conduct a general banking business, without the necessity of amending its charter, unless such charter expressly prohibits the exercise of such powers.

(d) Except to the extent inconsistent with or contrary to specific provisions of chapters 1, 2 and 3 of this title, Tennessee state banks, trust companies, savings and loan associations, and savings banks, and their directors, officers and shareholders shall be governed by and subject to the Tennessee Business Corporation Act, compiled in title 48, chapters 11-27, as the same may be amended from time to time, and successor statutes thereto. The commissioner has the authority to interpret the Tennessee Business Corporation Act as it applies to financial institutions subject to regulation by the commissioner.

(e) The charter of a trust company granted by the commissioner shall not be void due to the enactment of any amendment or repeal of the laws under which it was formed if such trust company is in operation, as determined by the

commissioner, on July 1, 1999.

(f) A company engaged in activities subject to chapters 1 and 2 of this title, on July 1, 1999, but formed, as determined by the commissioner, prior to the enactment of Acts 1980, ch. 620, and not previously subject to regulation by the commissioner, may continue to act as a fiduciary without submitting an application. However, such entity shall be otherwise fully subject to chapters 1 and 2 of this title.

(g) A company authorized by its charter, prior to the enactment of Acts 1980, ch. 620, to engage in fiduciary activities, but not engaging in fiduciary activities on July 1, 1999, must file the appropriate application to establish a trust company and then fully comply with chapters 1 and 2 of this title.

(h) All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of chapters 1 and 2 of this title and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999. During this period of time, to conform to the requirements of chapters 1 and 2 of this title, the commissioner may conduct examinations at such company's expense, and apply the requirements of chapters 1 and 2 of this title as deemed appropriate.

T.C.A. § 45-2-1001

45-2-1001. Company authorized to act as fiduciary

(a) No company shall act as a fiduciary in this state

except:

(1) A state trust company;

(2) A state bank authorized to act as a fiduciary;

(3) A savings association or savings bank organized under the laws of this state and authorized to act as a fiduciary;

(4) A national bank having its principal office in this state and authorized by the comptroller of the currency to act as a fiduciary pursuant to *12 U.S.C. § 92a;*

(5) A federally chartered savings association or savings bank having its principal office in this state and authorized by its federal chartering authority to act as a fiduciary;

(6) An out-of-state bank with a branch in this state established or maintained pursuant to this chapter, or a trust office authorized by the commissioner pursuant to this chapter;

(7) An out-of-state trust company with a trust office authorized by the commissioner pursuant to this chapter;

(8) A foreign bank with a trust office authorized by the commissioner pursuant to this chapter; or

(9) A private trust company to the extent authorized by the commissioner pursuant to this chapter.

(b) No company shall engage in an unauthorized trust activity. No company shall be deemed to be subject to the provisions of chapters 1 and 2 of this title, regulating fiduciary activities to the extent that the company's activities are permitted by existing statutory authority or are customarily performed as a traditional incident to the company's regular business activities.

(c) (1) A bank authorized to act as a fiduciary (which term includes a trust company, for the purposes of this section and

§ § 45-2-1002 -- 45-2-1006) having and maintaining paid-in capital and surplus of five hundred thousand dollars ($ 500,000) may be appointed a fiduciary or cofiduciary by any person or any court having jurisdiction and authority to appoint fiduciaries.

(2) When appointed as a fiduciary for a minor or other incompetent person, a bank shall have only the custody, control, management and administration of the property or estate of such person.

(3) The personal care and custody of any minor or other incompetent person shall be committed and confided to those individuals who would otherwise be entitled by law to the guardianship or care and custody of the person of such minor or incompetent person.

T.C.A. § 45-2-1021

45-2-1021. Sale of assets

(a) The board of a state trust company, with the commissioner's approval, may cause a state trust company to sell all or substantially all of its assets, including the right to control accounts established with the trust company, without shareholder approval if the commissioner finds the:

(b) A sale under this section must include an assumption and promise by the buyer to pay or otherwise discharge:

(1) All of the state trust company's liabilities to clients;

(1) Interests of the state trust company's clients and creditors are jeopardized because of insolvency or imminent insolvency of the state trust company; and

(2) Sale is in the best interest of the state trust company's clients and creditors.

(2) All of the state trust company's liabilities for salaries of the state trust company's employees incurred before the date of the sale;

(3) Obligations incurred by the commissioner arising out of the supervision or sale of the state trust company; and

(4) Fees and assessments due the department.

(c) This section does not affect the commissioner's right to take action under another law. The sale by a trust company of all or substantially all of its assets with shareholder approval is considered a voluntary dissolution and liquidation and is governed by § 45-2-1501.

HISTORY: Acts 1999, ch. 112, § 10.

T.C.A. § 45-2-1502

45-2-1502. Commissioner in possession

(a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:

(1) Its capital is impaired or it is otherwise in an unsound condition;

(2) Its business is being conducted in an unlawful or unsound manner;

(3) It is unable to continue normal operations; or

(4) Its examination has been obstructed or impeded.

(b) (1) The commissioner shall take possession by posting upon the premises a notice reciting that the commissioner is assuming possession pursuant to this section and the time, not earlier than the posting of the notice, when such possession shall be deemed to commence. A copy of the notice shall be filed in a court of general or equity jurisdiction in the county in which the institution is located. The commissioner shall notify the federal reserve bank of the district of taking possession of any state bank which is a member of the federal reserve system, and shall notify the Federal Deposit Insurance Corporation of the taking possession of any insured bank.

(2) When the commissioner has taken possession of a state bank, the commissioner shall be vested with the full and exclusive power of management and control, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate the commissioner's possession by restoring the bank to its board of directors, to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the bank in accordance with § § 45-2-1503 and 45-2-1504. As soon as practicable after taking possession, the commissioner shall make an inventory of the assets and file a copy thereof with the court in which the notice of possession was filed.

(3) When the commissioner has taken possession, there shall be a postponement until six (6) months after the commencement of such possession of the date upon which any period of limitation fixed by a statute or agreement would

otherwise expire on a claim or right of action of the bank, or upon which an appeal must be taken or a pleading or other document must be filed by the bank in any pending action or proceeding.

(c) (1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.

(2) If the commissioner determines to liquidate the state bank, the commissioner shall give such notice of such determination to the directors, stockholders, depositors and known creditors. Upon a determination to liquidate, the commissioner may, with ex parte approval of the court in which the notice of possession was filed, sell all or any part of the state bank's assets to another state or national bank or to the Federal Deposit Insurance Corporation. The commissioner may also, with ex parte approval of the court, borrow from the Federal Deposit Insurance Corporation any amount necessary to facilitate the assumption of deposit liabilities by a newly chartered or existing bank and may assign any part or all of the assets of the state bank as security for such loan.

(3) If the commissioner determines to reorganize the state bank, after according a hearing to all interested parties, the commissioner shall enter an order proposing a reorganization plan. A copy of the plan shall be sent to each depositor and creditor who will not receive payment of a claim in full under the plan, together with notice that, unless within fifteen (15) days the plan is disapproved in writing by persons holding one third (1/3) or more of the aggregate amount of such claims, the commissioner will proceed to effect the reorganization. A

department, agency or political subdivision of this state holding a claim which will not be paid in full is authorized to participate as any other creditor.

(d) No judgment, lien or attachment shall be executed upon any asset of the state bank while it is in the possession of the commissioner. Upon the election of the commissioner in connection with a liquidation or reorganization:

(1) Any lien or attachment, other than an attorney's or mechanic's lien, obtained upon any asset of the state bank during the commissioner's possession or within four (4) months prior to commencement thereof shall be vacated except liens created by the commissioner while in possession; and

(2) Any transfer of an asset of the state bank made after or in contemplation of its insolvency with intent to effect a preference shall be voided.

(e) The commissioner may borrow money in the name of the state bank and may pledge its assets as security for the loan.

(f) All necessary and reasonable expenses of the commissioner's possession of a state bank and of its reorganization or liquidation shall be defrayed from the assets thereof.

T.C.A. § 45-2-1504

45-2-1504. Liquidation by commissioner

(a) In liquidating a state bank, the commissioner may exercise any power of the office of commissioner, but shall not, without the approval of the court in which notice of possession has been filed:

(1) Sell any asset of the organization having a value in excess of five hundred dollars ($ 500);

(2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars ($ 500), exclusive of interest; or

(3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of the commissioner's determinations in accordance with this chapter.

(b) Within six (6) months of the commencement of liquidation, the commissioner may elect to terminate any executory contract under which the state bank has contracted either to receive or to provide services, such services specifically including advertising, or any obligation of the bank as a lessee. A lessor who receives sixty (60) days' notice of the commissioner's election to terminate the lease shall have no claim for rent other than rent accrued to the date of termination or for claims for damages for such termination.

(c) As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts. Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be given by registered mail to the parties by the transferee corporate fiduciary.

(d) As soon after the commencement of liquidation as practicable, the commissioner shall send notice of the liquidation to each known depositor, creditor and lessee of a

safe deposit box or bailor of property held by the bank at the address shown on the books of the institution. The notice shall also be published in a newspaper of general circulation in the community once a week for three (3) successive weeks. The commissioner shall send with the notice a statement of the amount shown on the books of the institution to be the claim of the depositor or creditor. The notice shall demand that property held by the bank as bailee or in a safe deposit box be withdrawn by the person entitled thereto and that claims of depositors and creditors, if the amount claimed differs from that stated in the notice to be due, be filed with the commissioner before a specified date not earlier than sixty (60) days thereafter in accordance with the procedure prescribed in the notice.

(e) Safe deposit boxes, the contents of which have not been removed before the date specified, shall be opened by the commissioner in the manner provided for boxes upon which the payment of rental is in default, and the sealed packages containing the contents and the certificates, together with any unclaimed property held by the bank as bailee and certified inventories thereof, shall be reported to the state treasurer who shall deal with them in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.

(f) Within six (6) months after the last day specified in the notice for the filing of claims or such longer period as may be allowed by the court in which notice of possession has been filed, the commissioner shall:

(1) Reject any claim if the commissioner doubts the validity thereof;

(2) Determine the amount, if any, owing to each known creditor or depositor and the priority class of the claim under

this chapter and chapter 1 of this title;

(3) Prepare a schedule of the commissioner's determinations for filing in the court in which notice of possession was filed; and

(4) Notify each person whose claim has not been allowed in full and publish once a week for three (3) successive weeks a notice of the time when and the place where the schedule of determinations will be available for inspection and the date, not sooner than thirty (30) days thereafter, when the commissioner will file the schedule in court.

(g) Within twenty (20) days after the filing of the commissioner's schedule, any creditor, depositor or stockholder may file an objection to any determination made. Any objections so filed shall be heard and determined by the court, upon such notice to the commissioner and interested claimants as the court may prescribe. If the objection is sustained, the court shall direct an appropriate modification of the schedule. After filing the schedule, the commissioner may, from time to time, make partial distribution to the holders of claims which are undisputed or have been allowed by the court, if a proper reserve is established for the payment of disputed claims. As soon as is practicable after the determination of all objections, the commissioner shall make final distribution.

(h) (1) The following claims shall have priority:

(A) Obligations incurred by the commissioner;

(B) Wages and salaries of officers and employees earned during the three-month period preceding the commissioner's possession in an amount not exceeding six hundred dollars ($ 600) for any one (1) person;

(C) Fees and assessments due to the department; and

(D) Deposits to the extent of ten dollars ($ 10.00) for each depositor.

(2) After the payment of all other claims with interest at the maximum rate permitted on time deposits, the commissioner shall pay claims otherwise proper which were not filed within the time prescribed.

(3) If the sum available for any class is insufficient to provide payment in full, such sum shall be distributed to the claimants in the class pro rata.

(i) Any assets remaining after all claims have been paid shall be distributed to the stockholders in accordance with their respective interests.

(j) Unclaimed funds remaining after completion of the liquidation shall be transferred to the state treasurer to be dealt with in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.

(k) When the assets have been distributed in accordance with this chapter and chapter 1 of this title, the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be relieved of liability in connection with the liquidation and the charter shall be cancelled.

APPENDIX G
STATE PROCEEDINGS: FEDERAL QUESTIONS RAISED

EXCERPTS: STATE TRIAL-COURT PETITION FOR *CERTIORARI* AND *SUPERSEDEAS*

"10. In addition to the Commissioner's lack of statutory authority to accomplish, as hereinbefore alleged, the charging actions, seizures, *de facto* removal of Respondent Company's officers and directors and termination of the employment of its employees, assumption of control of the assets it holds in trust in the possession of banks authorized to hold such assets, and *de facto* seizure and exercise of Respondent Company's powers and duties as Trustee and Paying Agents under all the bond instruments under which it has been so appointed, the Commissioner's actions and attempted exercise of jurisdiction under the Administrative Procedure Act, T.C.A. §§ 4-5-101, *et seq.*, his actions in such course of official actions which began with issuance of the said "Notice of Charges and Opportunity for Subsequent Hearing" on May 3, 2004, are arbitrary, unauthorized by law, and in excess of the powers vested in him by law, for the following additional reasons, which preclude any asserted "construction" that statutes enunciating empowerment to act in regard to state banks may empower such actions in regard to any trust company which is not a bank:

> "(a) To the extent that legislation may be contended to empower the Commissioner to take such actions as assuming Respondent Company's contractual obligations and rights to control all trust funds in its bank accounts by virtue of its status as Trustee and Paying Agent, the State of Tennessee (including its statutes and regulations) is constitutionally prohibited from taking such actions by prohibitions against it impairing the obligations of

contract, Constitution of Tennessee, Art. I, § 20 and Article XI, § 16, and the Constitution of the United States, Art I, § 10.

"(b) The Commissioner and the State of Tennessee are prohibited from seizing the property of Respondent Company, and the property of thousands of bond-holders and bond issuers which Respondent Company holds in trust, without just compensation, in violation of the Constitution of Tennessee, Art. I, § 8 and Art. XI, § 16, and the Constitution of the United States, Fifth Amendment and Fourteenth Amendment, § 1."

* * *

"The strength of the due process requirement of impartiality is such that the Supreme Court held, in *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965) that where a judge on a rehearing imposed upon a civil defendant the obligation to overcome a prior judge's inappropriate finding of non-support by bearing the burden of proof to show it was wrong, such predisposition by the judge denied the defendant the impartiality mandated by due process of law.

"In its prior decision denying *supersedeas*, this Court's opinion did not invoke any part of the law of statutory construction to prove the rightness of the denial, but merely accepted language tendered by the Attorney-General.[1] But such was an interlocutory order, subject to reconsideration at any

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[1] The Attorney-General acknowledged and quoted the rule that each word in a statute should be given its ordinary and normal meaning, but when Petitioners insisted that "bank" means "bank," she responded that this was a "novel" suggestion.

time before final judgment, and it still should be granted: There is no excuse for the Commissioner to deprive the petitioners of the real properties owned by Sentinel, which properties the Defendant Commissioner seized when Sentinel owned over $2 million in assets and owed no debts, but only the contingent possibility of future debt-determination in a manageable amount that eventually might exist if, after exhaustion of all collateral which Sentinel, in its fiduciary capacity, holds against the defaulted bond-issuers, there should remain a negative balance. Sentinel itself is the sole property of the Petitioner Danny Bates and his wife, and if Sentinel as a corporation is to be destroyed, they are entitled to have its real property distributed to them as the company's owners.

"Although putting aside past inclinations is difficult, it is an obligation any and every judge can meet unless he owns a personal interest in the litigation."

* * *

"The first absolute in Federal due process jurisprudence is that a state cannot seize private property without a prior meaningful hearing on the merits to determine that it is empowered to so take the property, *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), *Grannis v. Ordean,* 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914), *Armstrong v. Manzo,* 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

"In this case, the Commissioner plainly seized Sentinel without any prior evidentiary hearing upon previously-framed issues, but only a confrontation at which the Commissioner demanded actions according to the "law" he laid down. The Supreme Court has recognized that in spur-of-the-moment types of actions, as by a police officer or prison guard whose superiors cannot possibly know in advance what his actions

will be, or in great emergencies, it must suffice if a post-action due process hearing is provided reasonably soon after the fact, *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965), as distinguished from more deliberate, formal, and planned state action, which must be based upon the record of a *prior* hearing. *Wolff v. McDonald,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

"Here, the law specifically empowers the Commissioner to act after grounds for bank-seizure have been established, T.C.A. § 45-2-1502(a), [statutory quotations footnote omitted] but not without a prior hearing. But the Legislature has provided a specific and narrow exception—adequate to pass *federal* constitutional muster—for the Commissioner to seize a **state bank** without a hearing: He is so empowered whenever he concludes that "an emergency exists which *will result in serious losses to the depositors,* the commissioner may take possession of a state bank without a prior hearing." T.C.A. § 45-2-1502(c) (emphases added).

EXCERPTS: PETITIONERS' TRIAL COURT BRIEF ON *CERTIORARI* TRIAL

"It being the duty of every judge to overcome every natural bias, [2] this Court needs to be consciously aware of the

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[2] The obvious reason for the difficulty of this challenge is

attributes of the minimum degree of impartiality constitutionally required by the due process of law mandate of the Fourteenth Amendment. The U. S. Supreme Court has clearly defined the degree of impartiality required by due process:

"This requirement of neutrality in adjudicative proceedings . . . preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951)* (Frankfurter, J., concurring), by ensuring that *no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that* ***the arbiter is not predisposed to find against him."***

Marshall v. Jerrico, 446 U.S. 238, 242, 64 L. Ed. 2d 182, 188, 100 S. Ct. 1610, 1613(1980; Emphases added.)

The Court further emphasized the strength of the requirement of actual impartiality with the strong sentence, " Indeed, 'justice must satisfy the appearance of justice,' *Offutt v. United States, 348 U.S. 11, 14 (1954),* and this 'stringent rule

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that every human being has a "gut reaction" to difficult propositions, and a natural inclination to feel more at ease with the easier decision. This gives rise to a mental reaction called "cognitive dissonance," which leads a mind that made a wrong decision to adopt absurd reasoning whereby it convinces itself that the decision was indeed right. This trait, which no human mind can avoid, is described in fine detail in a leading and readable work, Brehm and Cohen, *Explorations in cognitive dissonance* (1962: John Wiley & Sons, Inc.).

may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' *In re Murchison, 349 U.S. 133, 136 (1955).* See also *Taylor v. Hayes, 418 U.S. 488 (1974).*" (446 U.S. at 243, 64 L. Ed. 2d at 189 100 S. Ct. at 1640).

"Hence if this Court finds itself predisposed to cling to a prior ruling that impliedly rejected Petitioners' rational demonstration that proper application of the law of statutory construction *precludes any possibility* that the Tennessee Banking Act, as amended, does not authorize the Defendant Commissioner to seize an insolvent *trust company,* as distinguished from an insolvent *state bank,* then the Court's due process obligation is to firmly put aside prior agreement with the Attorney-General's insistence that the subjection of every trust company to the Tennessee Banking Act means that every power granted the Commissioner for exercise over a bank can equally be exercised over a trust company.[3]

EXCERPTS: PETITIONERS' BRIEF IN THE COURT OF APPEALS

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[3] The Attorney-General's argument obviously presents an emotional approach which entirely puts aside the law of statutory construction: Each of us is subject to and under the authority of the entire Tennessee Code Annotated, but this does not mean that if one massages his weary spouse's back, this physical activity is within the enforcement powers (against them) of the laws on chiropractors or physical therapists found within the Code. Different provisions declare themselves applicable to different actions or businesses.

"5. Whether this Court should hold that the Commissioner's actions and the decisions of the Court below were contrary to the explicit constitutional protections secured to Sentinel and its owners as identified and alleged in detail in the petition for *Certiorari* including the State and Federal Constitutional prohibitions against warrantless seizure of property and against the taking of property without just compensation and the destruction of Sentinel's legal rights without due process of law, without just compensation, and contrary to the law of the land.

* * *

"2. The Court's failure to heed the controlling law in the *supersedeas* decision was, as shown below, a refusal to follow the law of the land, which obligated the Court to revisit the issue anew and give it serious and impartial consideration in the *certiorari* hearing and decision, but the Court appeared to disregard its duty imposed constitutionally by the Fourteenth Amendment's Due Process Clause, as pointed out to the Court: *"Armstrong v. Manzo,* 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965) [holds] that where a judge on a rehearing imposed upon a civil defendant the obligation to overcome a prior judge's inappropriate finding of non-support by bearing the burden of proof to show it was wrong, such predisposition by the judge denied the defendant the impartiality mandated by due process of law." (Trial Brief, 4, R. VII:886). Though Sentinel insisted before trial, in most respectful terms, that *Manzo* means it was obligated to consider anew the statutory construction issue, putting aside its interlocutory failure to follow that law in its *supersedeas* decision, the Court absolutely and explicitly refused to reconsider this issue *(supra,* p.30).

"Obviously, all recognize that personal interest or

animosity would disqualify any judge, but *Manzo* demands disqualification if the judge has decided to follow some procedural rule about burden of proof or to decline to give the required *bona fide* consideration anew of a hotly-contested issue presented in both an interlocutory motion hearing and the final trial on the merits. But further than this, it is true that: "Before a court whose purpose is to achieve a predetermined, unguided and unrestrained objective, no individual can hope to stand and receive a fair hearing." Drowota, J., concurring in majority opinion (also by Drowota, J.), *Summers v. Thompson,* 764 S.W.2d 182 (Tenn., 1988). Does not Justice Drowota's description of an unconstitutional degree of partiality equally apply when a judge has given passing consideration to a dispositive body of law in an interlocutory decision, and then refuses to reconsider that decision anew, particularly when neither any court nor any party has enunciated any serious refutation of Sentinel's studied argument?

"That factor is relevant, because the Court's stated reasoning used reliance on its own past erronious neglect to expound this law to support its supposition that it had now become too late to act, when the lateness was largely the result of the *supersedeas* decision. When the action of a state court wrongly denies due process, this is the action of the State itself, in violation of the Fourteenth Amendment, *Shelley v. Kraemer,* 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948)."

EXCERPTS: PETITIONERS' APPLICATION FOR PERMISSION TO APPEAL TO THE TENNESSEE SUPREME COURT

"3. Whether the Court of Appeals erred in refusing to hold that the assets-seizure acts of the Commissioner and his subsequent exercise of total control over all of Sentinel's assets and business were illegal upon asserted grounds that *(i)* under U. S. Supreme Court jurisprudence, such a state seizure *without **prior due-process hearing*** is always unconstitutional when the seizure is "caused by conduct pursuant to established state procedure, rather than random and unauthorized action."[4]; and *(ii)* there was no evidence that Sentinel was insolvent, but it was proven to be solvent when seized.

"4. Whether the judgments below were lacking in due process and contrary to the law of the land by virtue of the reviewing trial court's actions *(i)* refusing to apply the law of statutory construction in arriving at its interlocutory order denying the writ of *supersedeas, (ii)* in looking back upon the interlocutory ruling as partial justification for its refusal to grant *certiorari* relief by refusing again to give studied statutory construction rationale, such failure constituting—under U. S. Supreme Court jurisprudence— a lack of the minimum degree of judicial impartiality required by due process of law, together with *(iii)* the appellate court's judgment upholding such

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[4] As held in *Hudson v. Palmer,* 468 U.S. 517, 532, 104 S.Ct. 3194, 3203, 82 L.Ed. 2d 393, 407 (1984), explaining and following *Parratt v. Taylor*, 451 U.S. 527, 539; 101 S. Ct. 1908, 1915; 68 L. Ed. 2d 420, 431 (1981).

decision, constituted action by Tennessee's judicial department in support of the unauthorized action of a Tennessee executive department, whereby Tennessee violated of one or more of the U. S. Constitutional protections forbidding state action taking property without due process of law, seizing private property without probable cause and without a magistrate-issued warrant authorizing the seizure, and seizing private property without just compensation."